

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

**W. WILLARD WIRTZ, SECRETARY OF LABOR,
PETITIONER**

**LOCAL 150, GLASS BOTTLE BLOWERS
ASSOCIATION OF THE UNITED STATES
AND CANADA, AFL-CIO**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Supreme Court of the United States

OCTOBER TERM, 1967

No. 57

W. WILLARD WIRTZ, SECRETARY OF LABOR,
PETITIONER

vs.

LOCAL 153, GLASS BOTTLE BLOWERS
ASSOCIATION OF THE UNITED STATES
AND CANADA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

Nos. 15,759 and 16,048

[File Endorsement Omitted]

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO (GBBA),
DEFENDANT-APPELLEE

On Appeals from a Judgment and Order of the
United States District Court for the
Western District of Pennsylvania

APPENDIX FOR THE SECRETARY OF LABOR—
Filed August 23, 1966

AND APPENDIX FOR THE DEFENDANT-APPELLEE—
Filed October 13, 1966

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

LETTER FROM LEE W. MINTON TO JOHN MILLER.

RE: 7-12-4.

December 4, 1963

Mr. John L. Miller, Treas.
Local Union # 153—GBBA
Box 231
Avella, Pennsylvania

Dear Sir and Brother:

This is in further reference to your letter of October 24, 1963 in which you protested the manner in which the elections were conducted.

Mr. Bonus has made an investigation and it appears that the election was conducted in accordance with the desire of the local union that all International Constitutional provisions be complied with including eligibility requirements.

Nevertheless, I am continuing to look into the matter and will advise you further.

With kind regards, I am

Sincerely and fraternally,

LEE W. MINTON,
International President.

LWM:dd
cc: Joseph Bonus

[fol. 2]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed March 31, 1964

I.

Plaintiff brings this action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959. (Act of September 14, 1959, 73 Stat. 519, *et seq.*, 29 U.S.C. (1958 ed. Suppl. IV) 481, *et seq.*), hereinafter referred to as the Act.

II.

Jurisdiction of this action is conferred upon this Court by Section 402(b) of the Act (29 U.S.C. 482(b)).

III.

Local 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO (GBBA), herein-after called defendant union, is, and at all times herein-after mentioned has been, an unincorporated association maintaining its office in the city of Washington, County of Washington, Commonwealth of Pennsylvania, within the jurisdiction of this Court.

IV.

Defendant union is, and at all times relevant to this action has been, a local labor organization engaged in an industry affecting commerce, within the meaning of Sections 3(i), 3(j) and 401(b) of the Act (29 U.S.C. 402(i), (j) and 481(b)).

V.

Defendant local union, purporting to act pursuant to and in accordance with its bylaws and with the constitution [fol. 3] of the international union, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, hereinafter referred to as the international, conducted nominations of officers on August 8, 1963, and September

12, 1963, and election of officers on October 18, 1963, at Washington, Washington County, Commonwealth of Pennsylvania.

VI.

A member in good standing of the defendant union, acting pursuant to and in accordance with the international constitution and defendant union's bylaws, filed a protest of the conduct of such nominations and election with International President Lee W. Minton on October 24, 1963. Not having received a final decision within three (3) calendar months after invoking his internal union remedies, such member, on January 31, 1964, filed a complaint with the plaintiff herein in accordance with Section 402(a) of the Act (29 U.S.C. 482(a)), alleging violations of Section 401 of the Act (29 U.S.C. 481).

VII.

Plaintiff proceeded to investigate said complaint, and, as a result of facts shown by his investigation, found probable cause to believe that violations of Title IV of the Act had occurred with respect to the aforesaid election and had not been remedied at the time of institution of this suit.

VIII.

In the conduct of the nominations and election of its officers as aforesaid, defendant violated the provisions of Section 401 of the Act (29 U.S.C. 481) in the following respects:

- [fol. 4] 1. Defendant denied to its members in good standing a reasonable opportunity to nominate candidates for office, as required by Section 401(e) of the Act (29 U.S.C. 481(e)).
2. Defendant denied to its members in good standing the right to vote for and to otherwise support the candidate or candidates of their choice, as required by Section 401(e) of the Act. (29 U.S.C. 481(e)).
3. Defendant denied to many of its members in good standing the right to be a candidate for and to hold union

office, as required by Section 401(e) of the Act (29 U.S.C. 481(e)).

4. Defendant failed to elect union officers by secret ballot among its members in good standing, as required by Section 401(b) of the Act (29 U.S.C. 481(b)).

IX.

The violations of Section 401 of the Act (29 U.S.C. 481) found and alleged above may have affected the outcome of the election, and have not been corrected.

WHEREFORE, plaintiff prays for judgment:

- (a) declaring the election held by the defendant union on October 18, 1963, to be null and void;
- (b) enjoining and restraining defendant union, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with it, from concealing, selling conveying, transferring, or otherwise disposing of, the property or assets belonging to said defendant union or in which it has any direct or indirect interest, until further order of the Court;
- [fol. 5] (c) directing the conduct of a new election under the supervision of the plaintiff;
- (d) for the costs of this action; and
- (e) for such other relief as may be appropriate.

JOHN W. DOUGLAS
Assistant Attorney General

/s/ GUSTAVE DIAMOND
United States Attorney

CHARLES DONAHUE
Solicitor

JAMES R. BEAIRD
Associate Solicitor

ERNEST N. VOTAW
Regional Attorney

U. S. Department of Labor
Of Counsel

HARLAND F. LEATHERS
Attorney, Department of
Justice
Attorneys for Plaintiff

[fol. 6]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 12, 1964

1. The averments of Paragraph i of the Complaint, being mere conclusions of the Pleader, require no affirmative response by Defendant.
2. It is denied that this Court has jurisdiction of this action under Section 402(b) of the Act referred to in Paragraph 1 of the Complaint.
3. The averments of Paragraph 3 are admitted.
4. It is admitted that Defendant is a local labor organization engaged in an industry affecting commerce within the meaning of Sections 3(i) and 3(j) of the Act as aforesaid. It is specifically denied that Section 401(b) has any application to Defendant in this case.
5. It is admitted that Defendant, acting pursuant to the letter and spirit of its International Constitution and its By-Laws, conducted nominations of officers on August 8, 1963, and September 12, 1963, and an election of officers on October 18, 1963.
6. It is admitted that a member of Defendant Union filed a protest with International Secretary Newton W. Black on October 24, 1963. As to these averments of Paragraph 6 of the Complaint pertaining to members not receiving a final decision within three (3) calendar months, after invoking internal remedies, and subsequently complaining to Plaintiff herein, Defendant has no knowledge as to the truth of said averments and demands strict proof thereof at the time of trial to the extent same are material.
[fol. 7]
7. The averments of Paragraph 7 of the Complaint, being mere conclusions of the Pleader, require no affirmative response by the Defendant.
8. (1) It is denied that Section 401(e) of the Act was violated. It is further denied that Defendant denied its members in good standing a reasonable opportunity to nominate candidates for office.
(2) It is denied that Defendant denied to its members in good standing the right to vote for and otherwise

support the candidate or candidates of their choice, in violation of Section 401(e) of the Act.

(3) It is denied that Defendant denied to any of its members in good standing the right to be a candidate for and to hold Union office, in violation of Section 401(e) of the Act.

(4) It is further denied that Defendant failed to elect Union officers by secret ballot among the members in good standing as required by Section 401(b) of the Act as aforesaid.

9. It is specifically denied that Defendant violated Section 401 of the Act, and it is further specifically denied that any acts of Defendant herein affected the outcome of the election.

WHEREFORE, Defendant prays that this Court dismiss the Complaint filed against it.

BEN PAUL JUBBLIRER and
STUART E. SAVAGE

Of Counsel

PLONE, TOMER, PARKS & SALIGER

[fol. 8]

IN UNITED STATES DISTRICT COURT
TRANSCRIPT OF PRE-TRIAL PROCEEDINGS—March 9, 1965

COLLOQUY BETWEEN JUDGE DUMBAULD
AND MR. WEINER.

THE COURT: What I meant was, does the Government contend that in this particular case, by virtue of the rule, a corrupt and untrustworthy clique has succeeded in establishing itself in office, or are you merely attacking the general rule as such, as unreasonable?

MR. WEINER: We are attacking the rule as being unreasonable. We have no desire to indicate that there is any—

THE COURT: No maladministration of a particular group?

MR. WEINER: No. We have no basis for making such an allegation, nor do we wish to. The thrust of our position is that Congress has declared, in a statute, a purpose for granting individual union members rights in the exercise of which they will run their labor organizations, in accordance with what they deem to be their best interests. They should not be thwarted in this right.

A rule which precludes as much as 98 per cent of the union membership from exercising this right, which the Congress has seen fit to hand to the members, does precisely that, we say. It prevents the membership from having the kind of a voice in its affairs, in electing its officers, who represent these members in collective bargaining, in [fol. 9] the determination of grievances, by which they hold in their hands the economic welfare of the membership.

This the Congress, I am sure, did not intend to have as a result of such a rule. It did not want restrictive rules to prevent its purpose from being effectuated.

This is the thrust of our complaint.

THE COURT: In other words, there is no claim that there is any particular evil resulting from this election, but that future relief in future elections would be really what you are looking for.

And I gather that the elections are held in the fall. Is that right?

MR. WEINER: Every two years.

MR. PLONE: May I respond to that, sir?

May I first say that this District, your District, sir, has had the benefit of a similar question litigated before it in the *Martin v. Boilermakers* case decided by Judge Willson, where there was—I wouldn't want to categorize it as identical, but a similar rule for requirement of attendance of union membership, the result of which was that at the time there was going to be an election only fourteen members of the union were eligible, out of a membership of 175, which numerically is a comparison. Judge Willson found that the rule was not unreasonable.

[fol. 10]

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed July 8, 1965

It is this 7 day of July, 1965, hereby stipulated and agreed by the parties hereto as follows:

1. This action was instituted by the Secretary of Labor under the election provisions of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (Act of September 14, 1959, 73 Stat. 519, *et seq.*, 29 U.S.C. (1958 ed. Suppl. IV) 481, *et seq.*), hereinafter referred to as the Act, and seeks to have an election held by defendant local labor organization on October 18, 1963, declared null and void and a new election conducted under the supervision of the plaintiff.

2. The defendant, Local 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO (GBBA), is, and at all times hereinafter mentioned was, an unincorporated association maintaining its office in the City of Washington; County of Washington, Commonwealth of Pennsylvania, within the jurisdiction of this Court. Said defendant local labor organization is composed of approximately five hundred (500) members employed by the Brockway Glass Company, Incorporated, Washington, Commonwealth of Pennsylvania, a corporation having an annual dollar volume of business in interstate commerce in excess of one million dollars (\$1,000,000.00). Defendant is, and at all times relevant to this action has been, a local labor organization engaged in an industry affecting commerce, within the meaning of Sections 3(i), 3(j) and 401(b) of the Act (29 U.S.C. 402), (j) and 481(b)). Jurisdiction is conferred upon the [fol. 11] Court by Section 402(b) of the Act (29 U.S.C. 482(b)). The defendant local labor organization was chartered as Local Union 153 in April 1937, by the International Glass Bottle Blowers Association of the United States and Canada, AFL-CIO (GBBA).

3. Defendant local union conducted nominations of officers on August 8, 1963 and September 12, 1963, and elec-

tion of officers on October 18, 1963, in Washington, Washington County, Commonwealth of Pennsylvania. John L. Miller, a member of defendant union qualified to file a complaint with the Secretary of Labor, setting pursuant to and in accordance with the International Constitution and defendant's Bylaws, filed a complaint with the President of the International Union in a letter dated October 24, 1963, protesting the conduct of the aforesaid nominations and election of officers (Exhibit A, attached hereto and made a part hereof). Mr. Lee W. Minton, International President, acknowledged receipt of the protest by letter dated October 28, 1963 (Exhibit B, attached hereto and made a part hereof), and directed Mr. Joseph Bonus, an International Representative, to investigate the complaint concerning the conduct of the election (Exhibit C, attached hereto and made a part hereof). Mr. Bonus, in his report to the International President dated November 21, 1963, in effect recommended denial of the protest (Exhibit D, attached hereto and made a part hereof). In his reply to International Representative Bonus dated December 4, 1963, International President Minton requested him to "... give some thought to calling an election at least for the office of Recording Secretary or perhaps the Recording Secretary and three Trustees." On December 20, 1963, in his reply letter to Mr. Minton, Mr. Bonus stated his opinion that no election should be conducted for these offices but that "... the appointments should stand." (Exhibit E, attached hereto and made a part hereof). On December 31, 1963, International President Minton notified Charles Houston, Recording Secretary of defendant local union, that he had appointed an Executive Board Subcommittee to investigate further the matter (Exhibit F, attached hereto and made a part hereof). This Committee stated in its report to International President Minton dated January 21, 1964, that the complainant Miller was ineligible as a candidate under the attendance limitation noted, but recommended that serious consideration be given to "... an election for the office of Recording Secretary and three Trustees with the 75% attendance to run for local office waived ..." (Exhibit G, attached hereto and made a part hereof).

Not having received a final decision within three (3) calendar months after having invoked his internal remedies on October 24, 1963, the complainant filed a complaint with the plaintiff hereon on January 31, 1964, alleging violations of the Labor-Management Reporting and Disclosure Act of 1959 (Exhibit H, attached hereto and made a part hereof).

[fol. 13] 4. After investigating said complaint and, as a result of facts shown by that investigation, finding probable cause to believe that violations of Title IV of the Act had occurred with respect to the aforesaid election and had not been remedied, the Secretary of Labor instituted the within action against the defendant on March 31, 1964, alleging certain violations of Title IV of the Act.

5. The President of the defendant local union, Leslie R. Miles, appointed member Charles Houston as Recording Secretary, and members Italo Gizoni, Peter McCracken and Edward Szygenda as Trustees, and they were installed at the meeting of the local union on October 23, 1963, when the other elected local union officers were installed.

6. Article IX, Section 1, of the International Constitution provides that: "All candidates for office, before nomination, must have attended 75 per cent of the meetings for at least two years prior to the election."

Article 4, Section 12, of the defendant Local Union's Bylaws provide that: "No member may be a candidate unless said member is in good standing and has attended seventy-five per cent (75%) of the regular local meetings since the last local election."

In order to fulfill the attendance requirements, a member must have attended eighteen (18) of the twenty-four (24) regular meetings during the period October 1961 to October 1963. In applying these attendance eligibility requirements to the defendant local union, eleven (11) local [fol. 14] union members out of a total membership composed of approximately five hundred (500) members (or about 2.2 per cent) were qualified to run for union office in the challenged election. Nominations notices, dated August 5 and August 7, 1963 (Exhibits I and J, respectively, attached hereto and made a part hereof), listed

eleven (11) members eligible for office, including the complainant John L. Miller, beside whose name in parentheses was the notation "under consideration by the International." Complainant John L. Miller was nominated for President at the nomination meeting on August 8, 1963, and ruled ineligible pending an inquiry as to his qualifications by International Representative Bonus. On August 21, 1963, International Vice President Raymond Dalton advised Mr. Miller he was ineligible for nominations, as he did not meet the attendance requirements (Exhibit K, attached hereto and made a part hereof). Similarly, at the second nominations meeting held on September 12, 1963, complainant Miller was nominated for the office of Treasurer and was ruled ineligible to be a candidate. Defendant local union's records disclose that Miller was credited with actually attending seventeen (17) of the regular monthly meetings. He was prevented from attending one (1) of the seven (7) additional regular monthly meetings within the two (2) year period because he was hospitalized at that time at St. John's General Hospital, Pittsburgh, Commonwealth of Pennsylvania, from October 31, 1961 to November 27, 1961 (See Exhibit L, attached [fol. 15] hereto and made a part hereof). He was ruled ineligible by International Representative Bonus on August 8, 1963, and International Vice President Dalton on August 21, 1963, as not satisfying the attendance requirements because the only excused absence under the defendant Local Union's Bylaws was for work during the time of the meeting, provided the individual member notified the union within seventy-two (72) hours following the meeting of the fact that he was working (See Exhibits M and N, respectively, attached hereto and made a part hereof). In fact, the minutes of the regular monthly meeting on November 9, 1961, one of the seven (7) regular monthly meetings referred to above, indicate that John L. Miller was on the sick list at that time.

7. Complainant John L. Miller has been a dues paying member in the defendant local union for approximately twelve (12) years, and has served as Treasurer of the local union for four (4) years until the nominations and election challenged herein.

8. The 75 per cent attendance requirement has been completely waived at the discretion of the International Glass Bottle Blowers Association of the United States and Canada in other local union nominations and elections. There also has been partial waiving of the 75 per cent attendance rule, as in the case of Local 84, Kansas City, Missouri, where the attendance requirement was relaxed to the extent that absences for illness or vacation, as well as for work, were considered excusable absences.

[fol. 16] 9. Lee W. Minton, President of the International Glass Bottle Blowers Association of the United States and Canada, was advised by Frank P. Willette, Area Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor, by letter dated March 12, 1964, that the investigation thus far conducted had established probable cause to believe that the election under consideration violated Title IV of the Labor-Management Reporting and Disclosure Act of 1959 in the several particulars enumerated therein, and Mr. Minton was given the opportunity to present ". . . any additional evidence bearing on the violation or on any action which the parent union proposes to take to remedy the violation." No action has been taken by the parent union or the defendant local union to remedy the violations alleged in the Complaint herein. There have been no new nominations or election of officers since October 18, 1963.

10. One of the important purposes and objectives of the delegates to the conventions of the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, in promulgating the 75 per cent attendance requirement for eligibility for local union office was to encourage attendance at local union meetings by the members thereof, in order that such members may become aware of and familiar with the workings of their local unions, the kinds of problems and methods of procedure that confront their local unions in dealing with the problems of its membership, to obtain some knowledge as a predicate to their [fol. 17] possible candidacy to union office, and otherwise to conduct themselves as trade union members to the end

that they may make their union membership more meaningful.

11. One of the provisions of the Bylaws of Local 153 is that candidates for office in the local union must have attended at least 75 per cent of the regular monthly meetings since the last local election. It also is provided therein that:

In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting. The record of attendance compiled by the Secretary is the final local authority to determine eligibility for local office, the election of delegates to National Conventions, or such other meetings requiring elections.

Inasmuch as members of Local 153 work in a continuous operating industry and on a rotating shift in most instances, there is a substantial number of meetings which members do not attend, but for which said members may be marked present upon complying with the aforesaid requirements.

12. The meetings of the local union are held at the Washington Trades and Labor Building, 1 South College Street, Washington, Commonwealth of Pennsylvania. The regular meetings of Local 153 are required, under the provisions of its Bylaws, to be held on the second Thursday of each month and are required to commence at 8:00 p.m.

[fol. 18] 13. The International Constitution (as adopted and revised by action of the 62nd convention in 1961, Los Angeles, California) is attached hereto, made a part hereof, and marked Exhibit O. Defendant Local Union's By-laws (approved by Lee W. Minton, International President, on February 21, 1961) is attached hereto, made a part hereof, and marked Exhibit P.

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United States Department
of Labor

Attorneys for Plaintiff

[fol. 19]

EXHIBIT A TO STIPULATION

John L. Miller
Box 231
Avella, Pa.
Oct. 24, 1963

Dear Sir,

I John L. Miller Treas. of Local # 153 am entering an appeal of our election held Oct. 18, 1963. The grounds being I do not believe enough members were eligible to run for office. Only 16 of about 600 members were eligible to run for office. Of these 16 members, 4 were already holding office, myself excluded, because the President said I wasn't eligible to run because I lacked 1 meeting of the 75% meeting requirement. I have held this office for the past four years, during which time I was hospitalized because of a back injury for one month. I was under doctors care for a few months afterwards, and unable to attend meetings. During this time I attended to my office duties myself.

Since no one opposed the Vice Chairman or Financial Secretary they were automatically placed back in office. The Recording Secretary did not run for her office again nor did anyone else, thus the President said he would appoint someone to this office. I do not see how he can be permitted to do this as he stated no one was eligible to run for the office because of the 75% meeting requirement.

I feel every member should be permitted to run for an office if he wishes and not be limited to such a small amount of men because of this 75% meeting requirement.

JOHN L. MILLER
Treas. Local # 153

[fol. 20] EXHIBIT H TO STIPULATION

John L. Miller
Box 231
Avella, Pa.

Secretary of Labor
U.S. Dept. of Labor L.M.W.P.
802 Victory Building
Pittsburgh 22, Pa.

Dear Sir;

I, John L. Miller being a member in good standing of G.B.B.A.Local Union # 153, Washington, Pa. am filing a protest on the conduct of our election held Oct. 28, 1963. Both election and nominations violate federal law in that they asked unreasonable qualifications for nomination. I appealed to the Union for corrective action and I did not get a decision in three months.

Sincerely,

JOHN L. MILLER

[fol. 21] EXHIBIT O TO STIPULATION—

CONSTITUTION OF GLASS BOTTLE BLOWERS ASSOCIATION
OF THE UNITED STATES AND CANADA

Article IX, Section 1

Local Unions

Section 1. The Officers of the Local Union shall consist of a President, Vice President, Recording Secretary, Financial Secretary, Treasurer and three Trustees.

All Local Union Officers shall be elected at such meetings as specified in this Constitution and the Local Union By-Laws.

Said Local Union Officers shall serve for a term of at least two years or until their successors are elected, duly qualified and installed. All candidates for Office, before nomination, must have attended 75% of the meetings for at least two years prior to the election.

No Local Union shall allow dues to officers or appointees for services rendered, but the Local Union may fix such salaries for them as it decides.

[fol. 22] EXHIBIT P TO STIPULATION—
BY-LAWS OF LOCAL UNION NO. 153

1) Article II, Section 1

ARTICLE II

Meetings

Section 1. The regular meetings of this Local will be held the second Thursday of each month. Meetings to convene at 8:00 P.M. or the date, time, place, day also can be changed when deemed necessary by the President of this Local.

2) Article III, Sections 1-4

ARTICLE III

Officers, Committees and Their Duties

Section 1. The officers of Local Union No. 153 shall consist of a President, Vice President, Recording Secretary, Financial Secretary, Treasurer, Inside Guard, Outside Guard, and Three Trustees.

Section 2. All officers shall be elected or as specified hereinafter by these By-Laws.

Section 3. Any member in good standing of this Local shall be eligible to hold office providing they have attended 75% of the meetings prior to the election.

Section 4. Said Local Union Officers shall serve for a term of at least two years or until their successors are elected.

Treasurer

Section 12. The Treasurer shall receive from the Financial Secretary all monies collected, and give receipts for the same. It will be the duty of the Treasurer to receive all money coming into the Local. He will deposit in the name of the Local No. 153 of the Glass Bottle Blowers Association. He shall make no disbursements without the sanction of the Local Union and then only by warrant or check signed by the President and Financial Secretary.

He shall present to the Local Union, at the end of each half year, an itemized statement of all money received and paid out by him.

He shall report monthly to the Local Union meetings the state and condition of all current financial matters.

He shall submit his books for inspection and audit at the end of each half year, or at any time when called upon to do so.

He shall, in co-operation with the Financial Secretary, prepare and submit a budget which shall govern the expenditures of Local Union funds thereby guaranteeing adequate reserves for necessary and approved expenditures.

3) Article IV, Sections 1, 3, 7, 12-13

ARTICLE IV

Elections of Officers and Delegates

Section 1. Nominations for officers will be held the regular meetings in August and September.

[fol. 23] Section 3. Elected local officers shall serve for a term of two (2) years or until their successors are elected, duly qualified and installed. Notice of the election of local union officers shall be sent to each member of this local union by postcard at least 15 days in advance of the election date.

Section 7. All officers except conductors and inside and outside sentinels shall be elected by secret ballot.

Section 12. No members may be a candidate unless said member is in good standing and has attended seventy-five (75%) of the regular local meetings since the last local election.

Section 13. In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting. The record of attendance complied by the Secretary is the final local authority to determine eligibility for local office, the election of delegates to National Conventions or such other meetings requiring elections.

[fol. 24]

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed July 8, 1965

It is this 7 day of July, 1965, hereby stipulated and agreed by the parties hereto as follows:

1. In the event the decision and adjudication by this Honorable Court determines the [75%] attendance requirement embodied in Article IX, Section 1, of the International Constitution, and as contained in the Bylaws of defendant Local Union 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, is invalid, then the parties hereto agree that an order may be entered by this Honorable court directing nominations and election for all offices of the defendant Local Union 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, under the supervision of the Secretary of Labor, in accordance with the provisions of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (Act of September 14, 1959, 73 Stat. 519, *et seq.* 29 U.S.C. (1958 ed. Suppl. IV) 481, *et seq.*), and in conformity with the International Constitution and defendant Local Union's Bylaws, so far as is lawful and practicable, to supersede the election of officers held by said defendant local union on October 18, 1963.

2. In the event the decision and adjudication by this Honorable Court determines the aforesaid attendance requirement valid, then the parties hereto stipulate and [fol. 25] agree that nominations and election for offices of defendant local union to be conducted under the supervision and direction of the Secretary of Labor, as aforesaid, to supersede the election of officers held by said defendant local union on October 18, 1963, be scheduled sixty (60) days after any final appellate decision and adjudication on the question of the validity of the 75 per cent attendance requirement embodied in Article IX, Section 1, of the International Constitution, and contained in the Bylaws of the defendant, Local Union 153, Glass

Bottle Blowers Association of the United States and Canada, AFL-CIO.

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[fol. 26]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS—July 8, 1965

JOHN L. MILLER, a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEINER:

Q. Mr. Miller, where do you live?

A. I live at Washington, R.D. 3 right now.

Q. Where do you work?

A. Brockway Glass.

Q. What plant?

A. Plant 7.

Q. Where is that located?

A. Washington, Pennsylvania.

Q. Are you a member of Local 153 of the Glass Bottle Blowers Association?

A. For the last sixteen years.

Q. Were you a member of any union before this?

A. Yes.

MR. PLONE: I would object to going back into the history of this man's participation in labor unions. I think we are concerned with this problem as it applies—

THE COURT: Well, I suppose he was a member at the time that the event complained of took place?

[fol. 27] MR. PLONE: Stipulated to.

Q. And you were a member of—?

A. United Mine Workers.

MR. PLONE: The thrust of my objection was the fact that we are not concerned with the United Mine Workers.

THE COURT: Yes, that is irrelevant and that may be stricken.

Q. Mr. Miller, have you been interested in the affairs of Local 153?

A. Certainly have.

Q. Did you hold office at the time of the last election?

A. Yes, sir.

Q. What office?

A. Treasurer.

Q. How many terms did you hold that office?

A. Two.

Q. Did you go to meetings regularly while you were a member of Local 153?

A. I went to everyone that I could possibly be at.

Q. In the stipulation which was just filed with the Court we have said that between the period of October 18, 1961 to October 18, 1963, the date of the election that is challenged in this case, you attended seventeen meetings, monthly meetings, of the local union. Will you tell the Court why you did not attend the remaining seven meetings?

A. Well,—

MR. PLONE: If our Honor please, I think that re-[fol. 28] quires, with your permission, a challenge only with respect to specificity. In the answer we would like to have the reasons for not attending each and every one of these seven meetings rather than a general statement, so we can identify the meetings that he did not attend.

THE COURT: Yes. In other words, maybe you were sick at one meeting or your wife was sick at the time of another meeting and so on; so try to indicate in each case what it was that kept you away.

THE WITNESS: Yes, sir, I can answer.

THE COURT: Go ahead.

THE WITNESS: The meetings—so-called—that counsel over there is talking about, was under—all was under one sickness. I had a back injury and I was off. I was in St. John's Hospital over here for a month, and under a doctor's care the rest of the time. From 10/24/61 to 3/17/62 I was under Dr. McLaughlin's care in the Jenkins Arcade Building.

THE COURT: In other words, you are saying that all the meetings that you missed were missed for the same reason, your disability?

THE WITNESS: All but one, sir; and this one I should have had credit for, for this reason; my wife—

MR. PLONE: If your Honor please, I am going to have to know the identity—

[fol. 29] THE WITNESS: I am going to tell you it.

THE COURT: You say "this one," but we don't know what date it was or why you called it "this one."

THE WITNESS: August of 1962.

THE COURT: All right.

THE WITNESS: My wife had a miscarriage and I took her to the hospital and while she was in the delivery room I came down to the meeting and discharged my duties as treasurer of the local union by passing the checks and everything out to them. At the time when I got there the meeting was pretty well underway—on the way of being over, but I still got there as treasurer of that local and discharged my duties and went back to the hospital, and I didn't get credit for this meeting, which I thought I should have for that reason.

Outside of that, sir, them are the only meetings I ever missed in that local union.

Q. Now, Mr. Miller, have you attended many meetings during the past year?

A. No, sir.

Q. Why not?

A. For the simple reason—why go when you get treated like that and when I try to be a good union member and then— *

MR. WEINER: I will withdraw the question.

[fol. 30] Q. Were you acquainted with the business affairs of Local 153?

A. Yes, sir.

Q. And this was during the period 1961 to 1963?

A. Right.

Q. And did you participate actively in the various activities that you have just enumerated?

A. Right.

THE COURT: Is there anything else on direct?

MR. WEINER: If your Honor please, that is all we have to offer.

THE COURT: Do you wish to cross-examine?

CROSS-EXAMINATION
BY MR. PLONE:

Q. Mr. Miller, you held the office of treasurer of Local 153 for two terms, that correct?

A. Right.

Q. The first time was from October, 1959 to October, 1961, is that right?

A. Yes.

Q. And you presented yourself for nomination, or were presented for nomination in 1959 under the 75 per cent rule, is that correct, and you met that rule at that time?

A. Right.

Q. And you presented yourself in 1961 under the 75 per cent rule, did you not, and you met that rule, that correct?

A. Yes.

[fol. 31] Q. So that the question is what happened to your attendance between 1961 and 1963, is that correct?

A. Right.

Q. Your complaint is your lack of credit for meeting attendance affecting your standing for the 1963 election to be held, I believe it was, in October, 1963, that correct?

A. Right.

Q. Now, you claim, I presume to have a good memory? You are testifying this morning from memory, are you not?

A. Me?

Q. Yes.

A. I am testifying to my best ability. There are some things I cannot remember.

Q. Let us see what you can and cannot remember. Did you attend the meeting in October, 1961?

A. In October—

Q. Before your operation?

A. Before my operation?

Q. In October, 1961?

A. No. I was under a doctor's care.

Q. You did not attend that meeting?

A. No.

Q. Did you attend the meeting the month after your operation, in December 1961?

A. No. I was not allowed to.

Q. Did you attend the meeting in January, 1962?

A. January of 1962?

Q. That is two months after your operation?

A. No.

Q. Did you attend the meeting in February, 1962?

That is three months after your operation—three or four months.

A. No.

[fol. 32] Q. Did you attend the meeting of March, 1962?

A. March? No. I wouldn't say positive, but I don't think I did. I think I was still under the doctor's care.

Q. Did you attend the meeting of April, 1962?

A. I couldn't answer you truthfully on it. I couldn't say I did or didn't.

Q. How about May, 1962?

A. As far as I know, I attended those meetings, yes.

Q. May? June?

A. Yes.

Q. Did you attend the meeting of July, 1962?

A. Yes.

Q. Did you attend the meeting in August, 1962?

A. In August, yes.

Q. Did you attend the meeting of September, 1962?

A. Yes.

Q. Did you attend the meeting in October, 1962?

A. Yes.

Q. Did you attend the meeting in November, 1962?

A. November?

Q. A year after your operation. I will help you out.

A. Yes, I know when it was. I would say yeah, I was there.

Q. Did you attend the meeting in December, 1962?

A. I would say yeah.

Q. Did you attend the meeting in January, 1963?

A. January?

Q. January, 1963?

A. I was there.

Q. Did you attend a meeting in February, 1963?

A. I was there.

Q. Did you attend the meeting in March, 1963?
[fol. 33] A. I would say I was there.

Q. April, 1963?

A. I would say I was there at all of them.

Q. I am not interested in general statements. Did I ask you about April?

A. Yes.

Q. May, 1963?

A. I would say yeah.

Q. Were you there in June, 1963?

A. I would say yeah.

Q. And July, 1963?

A. I would say yes.

Q. September, 1963?

A. I will say yeah.

Q. How about August?

A. I will say yeah.

Q. Were you there in—Well October would have no significance.

I asked you about September, 1963?

A. Yes. The answer is yes.

Q. Now, of course, you were treasurer during all this period and one of your duties was to attend every meeting to make a report?

A. Yes, I done that sir. I took care of my duties —

Q. I am not asking you —

A. You asked me a question.

Q. Mr. Miller, will you just not continue talking?

A. I have to answer.

Q. Please, you will answer the question posed, and I was going to object to the Judge that your answer was not responsive.

I asked you whether you attended every one of the meetings you claim you attended in person to make the report, did you?

A. Yes.

Q. Did you also know that it was your responsibility as treasurer to attend every meeting to make such a report?

A. Definitely.

Q. Now, Mr. Miller —

A. Yes.

Q. —are you familiar with the attendance reports of Local 153?

A. Yes.

Q. Have you seen them before?

A. Yes.

Q. I show you what appears to be the attendance records of 153 for the years including 1961, 1962 —

MR. WEINER: Just a moment. May I take a look at these records. What kind of records are you asking questions about here? These have not been introduced. I know nothing about these records.

MR. PLONE: I think I have a right to ask this witness if he recognizes them.

THE COURT: I gather that the witness recognizes the book. Do you?

THE WITNESS: No, sir, I don't recognize this book. I recognize a card that we filled out—an attendance card that we filled out at the end of the meeting. At the end of the meeting they passed out cards and you put your name and clock card number on and your address and they [fol. 35] draw it—two \$5. drawings, and that is how they take the attendance of your meetings.

Q. Did they enter the card in the book?

A. The financial secretary.

Q. Is this the book they were entered into?

A. As far as I know, I guess it is the book.

Q. And you have seen these books before, Mr. Miller?

A. Yes.

Q. And these are the books that attendance cards are entered into?

A. Right.

MR. PLONE: I would like to have these marked for identification—the first, Defendant's Exhibit, I guess, 1 and 2, using the black book as 1.

Q. By the way, while the Government is looking at these books, these are the books that determine whether or not you are eligible under the 75 per cent rule, is that correct?

A. I couldn't tell you, sir.

Q. Don't they look at these books?

A. I couldn't tell you.

MR. WEINER: Are you marking these for identification?

MR. PLONE: For the moment. I am going to move their admission with a request to withdraw them and make copies. They are original records and cannot be replaced.

THE COURT: Any objection?

[fol. 36] MR. WEINER: Yes, definitely. We object to the admission of these books; not properly identified and nothing there to indicate who kept these records.

MR. PLONE: If your Honor please, the witness testified that he recognized these books as reflecting the attendance of the parties —

THE COURT: It seems to me that the witness sufficiently identified it.

Q. Mr. Miller, what is your clock number?

A. 767.

Q. And you know that you are marked present and absent according to your clock number?

A. No, I don't think I am.

Q. Well, I show you what is now in evidence as Defendant's Exhibit 1, crediting with attendance various members of Local 153, including yourself, and I want to be sure I am turning to the right year.

MR. PLONE: May I have the assistance of the records secretary?

THE COURT: All right.

This time that you speak of that you were held not eligible, who told you that you were not eligible?

THE WITNESS: The president of the local, Mr. Miles—President Miles.

THE COURT: And did he show you any book or anything to show that you had not been at the proper number of meetings?

[fol. 37] THE WITNESS: No, sir. All he'd tell me was I'm out of order, not eligible and that was it.

Q. Now, Mr. Miller, the attendance book, which I will state for the record is subject to testimony on support, is the book that is used to show you are eligible for office —

your eligibility for office—shows that you attended in 1961 a meeting in January, that you skipped certain meetings not pertinent to this case, you then went to a meeting in May?

MR. WEINER: What year is this?

MR. PLONE: 1961.

Q. You went to the June meeting in 1961; you missed the July meeting in 1961; you went to the August meeting in 1961; you missed the September meeting and you went to the October meeting in 1961. You went to the hospital in October, 1961 and you were there over the time that the November meeting took place?

A. Right.

Q. You were absent because of this condition?

A. Right.

Q. We all agree—the Government and I agree. However you were marked present and were present in the meeting of December, 1961? 767 is your clock number?

A. Right.

Q. You were marked present and attending the meeting of January, 1962. You were marked as present and attending the meeting in February, 1962. You were marked present and attending the meeting in March, 1962, likewise for April, 1962, May, 1962. You missed [fol. 38] the meeting in July, 1962. You attended the August, 1962 meeting—that the time you say you came in late?

A. That's right.

Q. Because your wife was in the hospital. But you were credited for having attended that meeting?

A. Yes.

Q. You were absent in September and October, 1962. You were marked present and attending the November meeting of 1962, the December of 1962 meeting, and I will now turn to Defendant's Exhibit 2. You were marked present and attending a meeting in January, 1963. You were marked absent in February, 1963. You were marked present and attending the meetings of March, April and May of 1963. You absented yourself from the meetings of June and July, 1963. You were working, and gave a slip to the union in August, 1963,

and were marked present even though you were not at the meeting, that correct?

A. Yes.

Q. That is exactly what the constitution says and you were given full credit, am I correct?

A. Yeah, yeah.

Q. You attended in person the meetings of September and October, 1963, and that is what we are concerned with at this point. There is some other history thereafter.

A. Yeah. I was off —

MR. PLONE: Just a moment. There are no questions pending.

If your Honor please, so that the record is clear, I started prior to the critical period in reviewing the meeting attendance records with the witness. I believe I started early in 1961, and, of course, the critical period here started in October, 1963 and ends October—forgive [fol. 39] me, sir—starts October, 1961 and ends up to and including the month of September, 1963. That is in the testimony, but I felt that I would like to indicate that this critical period commenced in October, 1961, and that the record, of course, is clear as to what the attendance record shows for that critical period.

THE COURT: Any re-direct?

RE-DIRECT EXAMINATION

BY MR. WEINER:

Q. You were just asked a series of questions about your attendance at meetings. Would you give the Court any explanation that you have for —

A. Yes, sir.

MR. PLONE: I object to that, your Honor. The record will show seventeen meetings including the one he is fussing about, and when he was supposed to be flat on his back after the operation, he went to meetings and was credited with them.

MR. WEINER: That is what we want him to explain.

MR. PLONE: There is nothing to explain.

MR. WEINER: Mr. Plone, you asked him a series of questions and I think this witness should be given an opportunity to make an explanation.

MR. PLONE: If your Honor please, is this anything other than repetition of what he already said, that the meetings he did not attend, he was sick at the time?

[fol. 40] THE COURT: Yes, but he didn't give, actually, the time he was off, the time that he first got injured.

Give us all the details of your injury.

THE WITNESS: August 1st, 1960, I first got injured and I was doctoring —

MR. PLONE: The record shows that he went to the meetings, one on the month after the operation, the second, third, fourth and fifth months and was credited with attending those meetings. His absence started long after this series of events.

THE COURT: Is everybody now satisfied with the state of the record.

THE WITNESS: No.

MR. WEINER: I am satisfied. We have no need to proceed further at this point.

THE COURT: Is there anything else that you want to say?

THE WITNESS: As I say, it's a long time and it could be that my wife is not sure of that date of that miscarriage and neither am I; I tried to get it from the doctor and couldn't get it, but Brother Miles knows it—if he tells the truth. When he comes up here he will state that fact.

[fol. 41] FRANK J. BUCHEK, a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JUBELIRER:

Q. What is your full name, sir?

A. Frank J. Buchek.

Q. Where do you live?

A. Washington, Pennsylvania.

Q. What is your address?

A. 3000 West Chestnut.

Q. What is your present occupation?

A. I am a shipper in Brockway Glass Plant No. 7.

Q. And how long have you been employed there?

A. Fifteen years.

Q. Are you a member of the local union?

A. Yes, I am.

Q. How long have you been a member of the local union?

A. Fifteen years.

Q. Do you hold any office in the union at the present time?

A. Recording secretary.

Q. And how long have you been recording secretary?

A. Almost a year.

Q. Now, as recording secretary of the union do you have in your custody and possession the records of the union kept in the regular course of the business of the union?

A. Yes, I do.

[fol. 42] MR. JUBELIRER: Mark these Defendant's Exhibit 3 for identification.

(So marked by the clerk.)

MR. JUBELIRER: Let the record show that I am handing Defendant's Exhibit 3 for identification to counsel for plaintiff in this case for examination.

Q. Now, I show you a document which has been marked for identification as Defendant's Exhibit No. 3 and ask you to identify this document.

A. These are John Miller's attendance records for the meetings of the local.

Q. Beginning October, 1961, through September, 1963, is that correct?

A. Right.

Q. Are you familiar with the signature of John L. Miller?

A. Yes, I am.

Q. And are you familiar with his signature by reason of being recording secretary and also a member of the business committee of the local union?

A. Right.

MR. JUBELIRER: We offer into evidence, your Honor, Defendant's Exhibit No. 3.

THE COURT: I presume it is understood that these are the original slips which Mr. Miller testified he signed?

MR. JUBELIRER: In person.

[fol. 43] THE COURT: All right. Without objection they will be received.

Q. There are sixteen attendance cards, Mr. Buchek; the one that is missing is August of 1962. I show you the document which is now in evidence as Defendant's Exhibit No. 1 and ask you if this Exhibit—if in this Exhibit, August of 1962 does not appear in this record, that John L. Miller was credited with being present in August, 1962?

A. According to the book, yes.

Q. Do you attend the meetings regularly?

A. Yes, I do.

Q. And approximately how many persons are generally in attendance at the regular meetings?

A. Well, they vary. There are 30, 40 or 50 people at each meeting.

Q. Now, how are the meetings conducted with reference to peace and good order?

A. Very good, I think very good, very well.

Q. Is there any fighting going on at the meetings in the sense that persons are argumentative or needling the members who wish to speak?

A. No. You have the buzz of people that express their opinion, but you have no confusion or anything.

Q. You do have differences of opinion expressed?

A. Right.

Q. Are the meetings disorderly?

A. No, they are not.

Q. Does each member of the union know who is in attendance at the meetings, and so have the right of free speech, the right of expression of speech?

A. They do.

[fol. 44] Q. Is anyone denied the right of free speech at such meetings?

A. No, they are not.

MR. JUBELIRER: Let the record show, your Honor, that there is no such charge presented by the Government to the effect that individuals are denied the right of free

speech at meetings; if such were the case, we would assume that the Government would so charge.

MR. WEINER: This is pure argument on the part of counsel. There is nothing in the record to indicate this at all as evidence.

THE COURT: Well, that is what he is saying, so I guess there is no dispute on that point.

Q. Referring to Exhibits 1 and 2 again, being the attendance books, are those Exhibits the official records of the union which determine the eligibility of members of the union for union office?

A. I don't quite —

Q. Do the attendance records reflected in Exhibits 1 and 2—Exhibits 1 and 2—are they the official records of the union which determine the eligibility of union members for union office?

A. They are.

MR. JUBELIRER: That's all, sir.

THE COURT: Any cross-examination?

[fol. 45]

IN UNITED STATES DISTRICT COURT

OPINION—Filed August 26, 1965

DUMBAULD, J.

The question for decision here is whether a provision requiring attendance at 75% of the regular meetings of a union for a two-year period since the last previous election in order to be eligible as a candidate for office in the union is or is not among the "reasonable qualifications" permitted by Section 401 (e) of the Labor-Management Reporting and Disclosure Act of September 14, 1959, (commonly known as the Landrum-Griffin Act), 73 Stat. 532, 29 U.S.C. 481 (e).

That section provides:

"(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and *every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed)* and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof."¹

[fol. 46] Section 402, 29 U.S.C. 482, provides enforcement procedure. Upon investigation of a complaint duly

¹ Italics supplied. Section 504, not pertinent here, prohibits holding of union office by Communists or convicts guilty of certain crimes. Incidentally, section 504 was held unconstitutional by the Supreme Court in *U.S. v. Brown*, 381 U.S. 437, 449 (1965) as being a bill of attainder (or legislative trial) at least as far as Communists are concerned. Perhaps convicts can still be excluded from union office [as they can be from the practice of medicine, *Hawker v. New York*, 170 U.S. 189, 191, 196 (1898)], as they must necessarily have had a judicial trial.

filed by a member of a labor organization, the Secretary of Labor, if he finds probable cause to believe that a violation of the election provisions of the Act has occurred and has not been remedied, may bring a civil action, against the union as an entity, to set aside the election and direct the conduct of an election under supervision of the Secretary.

If, upon a preponderance of the evidence after a trial upon the merits, the Court finds that the violation of Section 401, "may have affected the outcome of an election", the Court shall declare the election to be void and direct the conduct of a new election under the supervision of the Secretary.

It will be noted that the Court, in order to declare the election void, must find not only the existence of a violation but that the violation may have affected the outcome of the election.

The Court is vested with specific statutory jurisdiction in a proceeding *de novo* styled a civil action. This remedy is exclusive: *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964).

The Court is not exercising the function of judicial review of an administrative agency, where the doctrine of "primary jurisdiction" would apply, and the scope of [fol. 47] view would ordinarily be limited to the question of whether there was error or lack of substantial evidence to support the agency's conclusions. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907); *Rochester Tel. Corp. v. U.S.*, 307 U.S. 125, 139-40 (1939); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-88 (1951).

Here it can in no wise be contended, as Judge Learned Hand does in the instance of due process, that the courts are usurping power of the same sort which legislators exercise (though such usurpation is justified in order to prevent frustration of the governmental enterprise). Hand, *The Bill of Rights*, 29, 39 (1958). In our situation the power of the courts is expressly delegated by statute, and simply serves to bring into sharper focus a telescope which has already been pointed by Congress toward the

desired objective. *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 329 (1936).

We are therefore authorized to exercise a legitimate discretion with respect to the intrinsic propriety, wisdom, or expediency of the regulations under consideration when determining their reasonableness, and not merely to pass judgment on the issue of bare power as to whether another agency of government has acted *ultra vires*. Stated differently, the distinction may be illustrated by saying that our function is somewhat comparable to an appeal in equity as distinguished from a writ of error, or to a direct appeal as distinguished from the collateral review [fol. 48] permitted under the traditional or classical writ of habeas corpus. We must determine for ourselves on the merits the substantive question whether the result reached is right rather than merely the formal question whether someone else had power to pronounce and declare that it was right.

The By-Laws of defendant Local Union No. 153 of the Glass Bottle Blowers Association provide, in Article 2, sec. 1 that regular meetings will be held the second Thursday of each month at 8:00 P.M., unless otherwise directed. Articles 3 and 4 provide that all offices shall be elected, by secret ballot, for a term of two years. [This is in conformity with the requirements of 29 U.S.C. 481 (b)].

Article 4, sec. 12 is the crucial provision in this case. It ordains that: "No members [sic] may be a candidate unless said member is in good standing and has attended seventy-five (75%) of the regular local meetings since the last local election". This is supplemented by Art. 4, sec. 13, which provides that: "In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting".

Local 153 has approximately 500 members, of whom 11 (or 2.2 percent) were eligible for office at the challenged election held on October 18, 1963. The eligible list of eleven included the names of one Paul Gamber ("if he [fol. 49] attends the next 2 meetings") and of one John

L. Miller (with the notations "Under investigation", or "Under consideration by International"). The International on August 8 and 21, 1963, informed Miller that he was ineligible, by reason of failure to meet the attendance requirement. Miller had been Treasurer, and was proposed for nomination as President and as Treasurer at the 1963 election, but held to be disqualified under the By-Laws. Upon Miller's complaint, the Secretary of Labor filed the instant suit.

By reason of rotation in shifts, 469 members of the union are required to be at work on the date of union meetings at least six times during the two-year period of eligibility determination. Defendant computes that this means that as to 93.8% of the members, by virtue of the excusal provisions of Art. 4, Sec. 13, the 75% attendance requirement is reduced to a 50% requirement (Brief, p. 3). However, with respect to 31 workers not on rotating shifts, the 75% requirement is fully applicable without any abatement.

In view of the policy of the Act to promote equal rights among union members [29 U.S.C. 411(a) (1)] and of the terms of Section 401 (e) itself, it would appear that the rights of individual members as such are at issue, and hence that we must consider the effect of the challenged By-Law in accordance with its literal terms, and as applied to the minority of members upon whom it bears hardest. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 736-37 (1964).

[fol. 50] Plaintiff urges in support of its view the following language from Regulations issued by the Secretary issued on December 12, 1959, 29 C.F.R. 452.7(b):

"(b) The question of whether a qualification is reasonable is a matter which is not susceptible to precise definition and in the last analysis will be determined by the courts. Under certain circumstances a prerequisite for such candidacy may on its face appear to be reasonable, but this would not be controlling if, as a matter of fact, the effect of its application would be unreasonable and inharmonious

with the intent of the Act's election provisions. For example, a requirement that to be eligible to be a candidate for office an individual must have been a 'member in good standing' for a prescribed period of time, such as two or three years, would not be, in many instances, an unreasonable qualification. However, should the actual effect of such qualification in a particular case be to disqualify from holding office all but a handful of the labor organization's members, its reasonableness would be subject to serious question."

As plaintiff contends, the views of the Secretary are of great weight. Not only does this Court have great respect for the Secretary, but this Court agrees 100% with every word that is said in the quoted passage. The trouble is that all that is said is that the question of reasonableness is a difficult one and must ultimately be decided by the courts in the light of the facts in particular cases. We agree.

Defendant argues that the test of reasonableness here is the same as that when the constitutionality of legislation is challenged under the due process clause: in other [fol. 51] words, that the "rational basis" rule applies. That is to say, the By-Law as adopted by the union must be upheld if a reasonable mind would have a good reasons for adopting it. It must be upheld if it is rationally relevant to a legitimate regulatory purpose. As stated by Chief Justice Warren in *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954): "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective". A court does not act as a "superlegislature" to weigh the wisdom of regulations. *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423, 427 (1952); *Ferguson v. Skrupa*, 372 U.S. 726, 729-32 (1963).

It is then argued that such a good reason is to encourage participation in union affairs and attendance at meetings in order to become familiar with the workings of the organization before undertaking to serve as a union officer.

Another analogous situation in which courts pass on "reasonableness" is in Antitrust cases. Here, however, the insertion of that standard into the legislation as enacted by Congress is a pure judicial creation devised first by Mr. Chief Justice White in *Standard Oil Co. v. U.S.*, 221 U.S. 1, 60, 63-67 (1911).

[fol. 52] More to the point is the analogy to the function of the Interstate Commerce Commission, and similar regulatory agencies, in establishing "just and reasonable" rates. 49 U.S.C. 15. In other words, Congress itself enacts a nonspecific standard, the application of which to specific situations is entrusted to the judicial process of inclusion and exclusion.

The Court therefore in a particular case must not only consider the existence *vel non* of a scintilla of rational support for the rule put forth, but must (by a process similar to that prescribed in the *Universal Camera* case), take into consideration the entire situation presented by the record, and give due weight to every aspect of the facts established. In other words, the Court must also inquire whether the legitimate purpose sought to be achieved could be attained in a manner less destructive of other legally protected interests. *Schneider v. Irvington*, 308 U.S. 147, 162 (1939); *Henry v. Mississippi*, 379 U.S. 443, 447-49 (1965). We note that there may be a fairly extensive "zone of reasonableness" and that comparison with comparable practices may be a standard for determining reasonableness. *Georgia v. P.R.R. Co.*, 324 U.S. 439, 460-61 (1945); *Youngstown Sheet & Tube Co. v. U.S.*, 295 U.S. 476, 480 (1935).

Moreover, the determination must seek to give effect to the policies of the Act. Reasonableness is not to be assessed *in vacuo*, but in the light of the purposes which the [fol. 53] Congress sought to achieve and the evils which it sought to eliminate. Union democracy, effective self-government, abolition of oligarchical cliques and self-serving union officers were in the forefront of Congressional thinking. Section 401 itself seeks to open the path of eligibility to office to all union members in good standing, except where restrictions of reasonable character, and uniformly imposed, may be appropriate. *Mamula v. Steel-*

workers, 304 F. 2d 108, 110-111 (1962); 86th Cong. 1st Sess. Sen. Rep. No. 187, p. 20, appearing at p. 16 of Vol. 1 of *Legislative History* of the Act, published by the NLRB, Washington, 1959. It must also be remembered that restrictions on eligibility also constitute a corresponding restriction on the right of choice by other members. *Fogle v. Steelworkers*, 230 F. Supp. 797, 798 (W.D. Pa. 1964).

Plaintiff argues that the 75% requirement has no rational relation to any legitimate labor union objective. This contention in its broad form is obviously untenable, as it is a very proper objective to encourage attendance at union meetings, and to require office holders to have acquired a sufficient familiarity with union affairs to be properly qualified to discharge their trusts effectively and in keeping with the sentiments of the membership. Past conduct is often a proper test of future fitness. [See cases collected in Dumbauld, *The Constitution of the United States* (1964) 199-200.

[fol. 54] Plaintiff stands on more solid ground in arguing that the requirement goes too far. This contention is three-pronged: (1) 75% is too high a percentage; (2) the provision for excuses is too rigid, being limited only to work on the job during meetings; (3) the effect of the rule as applied here results in "only a handful" of eligibles (2.2% of membership qualified).

To select a particular percentage of attendance as being reasonable and hence permissible is akin to the task of determining what percentage of market control is necessary to establish the existence of a monopoly. On this issue a reversed Judge, Learned Hand, once said "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." Ninety was enough, however. *U.S. v. Aluminum Co. of America*, 146 F. 2d 416, 424 (C.C.A. 2, 1945). We conclude that 75 is too high a percentage when combined with the strict rule regarding excuses.

To be reasonable a rule must give appropriate recognition to human nature and the normal needs of a workman in his everyday life. Union members can not be expected to devote undeviating attention to union business, to the

neglect of their health, family obligations, vacations and the usual pleasures and vicissitudes of life. They do not form a military community or a religious order, separated from the world at large.

[fol. 55] A rule which limits the eligible group to 2.2% of the membership seems to be too harsh. The only judicial precedent cited by counsel is *John C. Martin v. Boilermakers*, W.D. Pa. Civil No. 969 Erie, where on June 26, 1963, my esteemed colleague Judge Willson upheld the reasonableness of the eligibility requirements of that union's constitution. However, the requirement there was only one meeting out of each quarter of the calendar year and the quarter immediately preceding nominations. Moreover, the provision for excuses was liberal: it recognized "personal illness, International or District or Local Lodge duties, regular employment or some other unavoidable situation". There 14 members out of a total of 175 were found to be qualified (a figure in excess of 10% of the membership).

Under these circumstances, Judge Willson said (and I agree) :

"Plaintiff, however, seems to make a blank charge that the amendment requiring the attendance at one meeting during each of the five quarters to become eligible to hold office is, per se, an unreasonable regulation. However, this contention, if seriously made, is rejected because it seems very clear to the court that the regulation is reasonable. Certainly there is nothing illegal about it, not [sic] does it appear burdensome. The rule is almost the minimum attend-

[fol. 56] ance requirement. It simply requires that a member attend one meeting in each three month period. But, it is to be noticed that he may be excused from that by illness or if his work interferes. The language which justifies no attendance is broad. It says:

"and (d) have attended at least one (1) meeting out of each quarter of the calendar year and the quarter immediately preceding nominations for office unless prevented by personal illness, Inter-

national or District or Local Lodge duties, regular employment or some other unavoidable situation.' Article XXVIII, p. 111)

To hold that such a regulation is unreasonable would hold in effect that there can be no attendance requirement whatever in this union. I find the regulations as adopted at the International Convention to be reasonable in all respects."

In order for there to be a real choice in the selection of officers, a system of screening ought to produce as eligibles at least twice the number of officers to be elected. Out of the air, I should take 10 percent of the membership as the minimum number from which nominations and elections are to be made.

Art. 3, sec. 1 of defendant's By-Laws provides for the election of ten officers. The eligible list included only eleven names (including Gamber and Miller, thus ultimately [fol. 57] nine or ten). This did not give the members a chance to choose between two full slates. In fact there were no candidates for four offices, and the present incumbants thereof are serving by appointment to fill vacancies, in apparent violation of Art. 3, sec. 8 which calls for a special election from eligible candidates. But the paucity of eligible candidates would result in impossibility of performance if the procedure of Art. 3, sec. 8 were adhered to. The majority of the members preferred to avoid the expense of a special election and International representative Bonus recommended that the appointed officers continue to serve as "those members appointed will cooperate with us, if necessary, at anytime." Stipulation, Ex. D, E, and G.

Considering the combined effect of the three objections urged by plaintiff, we conclude that the requirements imposed by the By-Laws are not "reasonable qualifications" within the meaning of Section 401 (e).

That is not the end of the matter, however. To direct a new election the Court must find that the violation of Section 401 (e) "may have effected the outcome of an election". As was true in *Wirtz v. Hod Carriers*, 211 F. Supp. 408, 413 (W.D.Pa. 1962), this factor of causation has not been adequately established.

The evidence shows that complainant Miller voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his [fol. 58] failure to qualify was not due to the existence of the unreasonable requirements of the By-Laws but to his own voluntary unwillingness to comply therewith.

Hence it seems inadvisable to decree the holding of a new election. It will be preferable to await appropriate action enabling the next election to be held in full conformity with the Act as judicially expounded.

[fol. 59]

IN UNITED STATES DISTRICT COURT

JUDGMENT—August 26, 1965

AND NOW, this 26th day of August, 1965, after trial and hearing argument of counsel and receipt of briefs, for the reasons set forth in the foregoing opinion,

IT IS ADJUDGED, DECREED, AND FINALLY DETERMINED that the action herein be and the same hereby is dismissed, the Court retaining jurisdiction of the cause for such further action, if any, as may be required in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union.

/s/ DUMBAULD
United States District Judge

Copies to:

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MARSHALL H. HARRIS, ESQ. Deputy Regional Attorney United States Department of Labor Chambersburg, Pennsylvania	

[fol. 60]

IN UNITED STATES DISTRICT COURT
FOR THE THIRD CIRCUIT

* * *
ORDER—February 25, 1966

Present: HASTIE and SMITH, *Circuit Judges*, and KIRK-PATRICK, *District Judge*.

Upon consideration of the motion by plaintiff, appellant in the above entitled case, and after hearing,

It is ORDERED that the cause be and it hereby is remanded to the District Court and leave be and hereby is granted plaintiff to apply to the District Court to consider and rule upon a post-judgment motion to be made on behalf of the plaintiff in that Court;

It is Further ORDERED that jurisdiction of the appeal be and it hereby is retained and that the time for filing and serving the brief and appendix for appellant shall commence to run from the filing with this Court of the supplement to the record, consisting of proceedings in the District Court subsequent to this remand.

By the Court,

WILLIAM H. HASTIE
Circuit Judge

Dated: February 25, 1966

[No. 61]

IN UNITED STATES DISTRICT COURT

MOTION FOR AN ORDER TO DECLARE ELECTION VOID
AND INVALID, ETC.—Filed March 21, 1966

AND NOW, comes the United States of America by Gustave Diamond, United States Attorney for the Western District of Pennsylvania and Stanley W. Greenfield, Assistant United States Attorney, and moves this Court for an Order declaring the regular general election of officers of Local 153, Glass Bottle Blowers Association of the United States and Canada on October 12, 1965, invalid and that a new election under the supervision of the Secretary of Labor be held, and in support thereof asserts the following:

1. By opinion entered on August 26, 1965, for this Court held that the by-law requiring candidates for union office to have attended seventy-five percent (75%) of the union regular meetings during the two year period since the last election was held, was an unreasonable qualification for candidacy, in violation of Section 401(e) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 481(e).

2. This Court further noted in its opinion that:

"It seems inadvisable to delay the holding of a new election. It will be preferable to await appropriate action enabling the next election to be held in full conformity with the Act as judicially expounded".

[fol. 62] 3. The Judgment accompanying the Court's opinion was also entered on August 26, 1965, dismissing the action herein:

"The Court retaining jurisdiction of the cause for such further action, if any, as may be required in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the

next regularly ensuing election of officers of defendant union."

4. The United States Department of Labor advises that the defendant union conducted its regular general election of officers on October 12, 1965, with the by-law declared invalid by this Court remaining in effect.

5. The defendant union's election held on October 12, 1965, under the provision and with the application of the seventy-five percent (75%) by-law, was in contravention of this Court's judgment holding said by-law to be invalid.

6. On February 25, 1966, the Third Circuit Court of Appeals remanded this cause to the district court for the purpose of having the aforesaid matters brought to its attention in the form of a post judgment motion by the plaintiff-appellant, Secretary of Labor.

WHEREFORE, this motion.

Respectfully submitted,

GUSTAVE DIAMOND
United States Attorney

By:

STANLEY W. GREENFIELD
Assistant United States
Attorney

[fol. 63]

AFFIDAVIT IN SUPPORT OF MOTION THAT ELECTION OF
OCTOBER 12, 1965 BE DECLARED INVALID AND FOR
NEW SUPERVISED ELECTION—Filed April 8, 1966

STATE OF MARYLAND

) ss;

COUNTY OF MONTGOMERY)

Now comes FRANK M. KLEILER, who first being duly sworn, deposes and says:

That I am the Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor; and that under and by virtue of a General Order of the Secretary of Labor dated August 9, 1963, and published in 28 F.R. 9173, the duties of my office include the making of investigations required and authorized by the Labor-Management Reporting and Disclosure Act of 1959. ("LMRDA", 29 U.S.C. 401 *et seq.*).

That after such investigation, I am informed and believe as follows:

1. That a regular general election of Local Union officers was held by defendant Local 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO (GBBA), on October 12, 1965, subsequent to the opinion and Judgment entered in Civil Action No. 64-278 by the Court on August 26, 1965.

[fol. 64] 2. That Article 4, Section 12 of the defendant Local Union Bylaws and Article 4, Section 13 of the defendant Local Union Bylaws, in issue in this case on the question of "reasonableness" within the meaning of Section 401(e) of the LMRDA, 29 U.S.C. 481(e), provide:

Article 4, Section 12:

No member may be a candidate unless said member is in good standing and has attended seventy-five per cent (75%) of the regular local meetings since the last local election.

Article 4, Section 13:

In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting.

3. That by the aforesaid opinion entered on August 26, 1965, this Court held that the attendance requirements imposed by the above Bylaws of defendant Local Union 153, namely, Article 4, Section 12 and Article 4, Section 13 are not reasonable qualifications for candidacy for union office in violation of Section 401(e) of the LMRDA, 29 U.S.C. 481(e).

4. That defendant Local Union conducted its regular general election of officers on October 12, 1965 with its aforesaid Bylaws, Article 4, Section 12 and Article 4, Section 13 remaining in full force and effect without change or amendment since the opinion and Judgment of this Court entered August 26, 1965.

[fol. 65] 5. That at the time of the election of officers on October 12, 1965, the defendant Local Union consisted of approximately five hundred (500) members, about the same number as in the previously challenged election held on October 18, 1963.

6. That under the aforesaid Bylaws of the defendant Union, Article 4, Section 12 and Article 4, Section 13; in effect at the time of the election on October 12, 1965; thirteen (13) members (or 2.6%) were eligible to run for office, only two more members than in the previously challenged election held on October 18, 1963.

7. That the following was the number of candidates for each office in the regular general election held on October 12, 1965:

President	1
Vice-President	2
Recording Secretary	1
Financial Secretary	2
Treasurer	2
Three Trustees	0

8. That in the election conducted by the defendant Local Union on October 12, 1965, as in the previously challenged election held on October 18, 1963, the President of the defendant Local Union appointed the three incumbent Trustees all of whom were ineligible under Article 4, Section 12 and Article 4, Section 13 of the defendant Union's aforesaid Bylaws.

[fol. 66] 9. That there were no members nominated and disqualified under the 75% attendance rule at the general election held by the defendant Union on October 12, 1965.

10. That there was no instance where the 75% attendance requirement was waived on behalf of any nominee for office.

/s/ FRANK M. KLEILER
FRANK M. KLEILER
Director
Office of Labor-Management
and Welfare-Pension Office

Sworn to and subscribed before me this 4th day of April, 1966.

/s/ R. CRESAP DORUS
Notary Public

My commission expires July 1, 1967.

[fol. 67]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 64-278

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

vs.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO (GBBA),
DEFENDANT

ORDER OF COURT—May 27, 1966.

AND NOW, this 27th day of May, 1966, upon consideration of plaintiff's motion for post-judgment relief, after hearing and argument, and it appearing that the purpose of the language in this Court's judgment of August 26, 1965, "retaining jurisdiction of the cause for such further action, if any, as may be required in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union" was to expedite and accelerate the remedying of such future complaints as might arise out of future grievances involving alleged violations of the Act of similar character to those passed upon in said opinion; and the Court being now of opinion that perhaps the inclusion of said language was improvident as perhaps being inconsistent with the statutory scheme established for dealing with and remedying such grievances or violations, but the Court being of opinion that in any event the action which plaintiff now seeks [fol. 68] would not fall within the terms of such language; and the Court further being of opinion that in the election of October 12, 1965, with respect to which plaintiff is now seeking relief, the regulations condemned by this Court's

opinion of August 26, 1965, have not been demonstrated to have affected in any respect the outcome of the election, and that indeed such regulations did not come into play at all as there was nothing upon which they could operate, and that no candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations (see par. 9 of affidavit of Frank M. Kleiler, submitted in support of plaintiff's motion); and the Court being satisfied by the statements and assurances of defendants' counsel at the hearing of May 26, 1966, that defendants in good faith and with due diligence are taking appropriate steps with all convenient speed to reform and amend the regulations governing elections so as to bring them into conformity with the views expressed in this Court's opinion of August 26, 1965; and the Court being of opinion that the period between August 26, 1965, the date of this Court's opinion, and October 12, 1965, the date of the subsequent election with respect to which plaintiff now seeks relief, was not sufficient time in which to effect in due course the reforms required in order to bring about conformity with the views expressed in this Court's said opinion of August 26, 1965; and the Court further being of opinion that before disrupting the existing election procedure, or the results thereof, as plaintiff now seeks, because of want of conformity unto the views ex-[fol. 69] pressed in this Court's said opinion of August 26, 1965, defendants are entitled to await the outcome of the appeal now pending from this Court's judgment embodying said views, in order to be assured that said views are sound and acceptable legal doctrine and that the steps being taken by defendants to effect conformity therewith will not prove to have been a vain, transitory, needless and unfruitful burden,

IT IS ORDERED that the relief prayed for in said motion be and the same hereby is denied.

/s/ DUMBAULD

United States District Judge

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[fol. 70] LETTER DATED JUNE 22, 1966

June 22, 1966

Hon. Willard Wirtz
Secretary of Labor
U. S. Department of Labor
Washington 25, D. C.

Dear Secretary Wirtz:

In accordance with our conversations when we met in your office on June 13, 1966, I have prepared the following areas of excused absences that will be considered in applying the attendance requirements under the 75% rule provided by the Constitution of the Glass Bottle Blowers Association of the U. S. and Canada, Article 9, Section 1, in order to insure the greatest latitude for candidacy for local union office:

1. Absences due to illness of the member.
2. Absences due to illness of someone in the member's immediate family; that is, wife or child.
3. Absences due to attending to a family event such as departure of a son or daughter who is about to leave for the armed forces, or visiting a son or daughter in the armed forces. Also, attendance at the graduation of a son or daughter from school, or some similar family event.
4. Absences due to vacations.

[fol. 71] 5. Attendance at armed forces reserve meetings or training programs, or attendance at National Guard meetings or training programs.

6. Absences due to jury duty.
7. Absences due to death in the employee's family as defined in the collective bargaining agreement.
8. It could also be considered desirable to provide for the excuse of members who are absent from meetings due to participation in some important community event or community program. Also, absence

due to the participation by a member in attendance to his duties in a public office that he might hold, such as town council member, or school board member, or perhaps important meetings of a fire company to which he might belong. It would be difficult to list each and every type of event or meeting that would fall in this general category.

These excuses would be in addition to the historic excuse, that of being at work at the time that the meeting was called.

Consideration and granting of these various excuses should be on the requirement that the member seeking to be credited with attending a meeting though absent for any one of the aforementioned reasons make such request and that he state the reason therefor in a written note or statement to the recording secretary of the local union within 72 hours.

It would appear to me that in order that there be no question about the requesting of the credit for the absence [fol: 72] and the propriety of the reason therefor, that some writing emanate from the member seeking such credit and that the recording secretary be responsible to obtain and retain same.

I would also have no objection to Judge Dumbauld's suggestion, in the case involving Local Union # 153, that in any event at least 10% of the membership be eligible to be nominated as candidates for local union office.

I have continuously been in agreement that candidates for nomination and election as delegates to the Quadrennial Convention should not have their meeting attendance requirements computed since the last Quadrennial Convention as set forth in Article 2, Section 3 of the Constitution.

Rather, that meeting attendance should be computed on a two year basis similar to that for local union officers. My agreement to open-end the 75% meeting attendance requirement in accordance with the aforementioned is, of course, conditioned on the U. S. Department of Labor dismissing all suits against affiliates of, and/or, this International Union.

Upon receipt of your agreement, I shall immediately promulgate the aforementioned rules and regulations and make them available to all our local unions and members.

Sincerely yours,

LEE W. MINTON,
International President.

LWM:dd

[fol. 73] LETTER DATED AUGUST 22, 1966.

U. S. DEPARTMENT OF LABOR
Office of the Secretary
Washington

Aug. 22, 1966

Mr. Lee W. Minton
International President
Glass Bottle Blowers' Association
of the United States and Canada, AFL-CIO
226 South 16th Street
Philadelphia, Pennsylvania 19102

Dear Mr. Minton:

The proposal outlined in your letter of June 22 has been carefully considered.

The proposed amendment to Article 9, Section 1 providing for additional excused absences and the proposed amendment to Article 2, Section 3 of the Constitution to compute attendance of delegate nominees on a two-year rather than four-year basis theoretically would mitigate the disqualifying effect of the 75% rule. From our experience in cases involving attendance requirements, however, it appears that most union members do not take timely action to obtain excuses for failure to attend meetings

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even though they have grounds for being excused; and so I have little faith that the changes which you propose would substantially increase the number of members who would be eligible to run for office. I am afraid that we would continue to get cases in which only a few members besides the incumbent officers (who often are paid for performing union duties including attendance at meetings) would be eligible for nomination.

[fol. 74] Adoption of Judge Dumbauld's suggestion—that in no event should less than 10% of the membership be eligible for nomination—would reduce the unreasonable effects of the 75% attendance rule, but I think it would present some practical difficulties in its application. It would increase the burden on your local officers in determining which 10% of the membership would be considered eligible if less than 10% meet the 75% rule; and I suppose we would get complaints about the record checking and statistical work which would become necessary to operate under such a formula.

Furthermore, an inherent defect in the suggested 10% rule becomes readily apparent in cases involving small locals. Because your Constitution requires that eight local officers must be elected, application of the 10% rule would not provide sufficient candidates to fill all offices in locals with fewer than 80 members, and even in somewhat larger locals it would not provide sufficient candidates for a contest. Rather than adopt the 10% rule, I think you would be better advised to waive the attendance requirement in its entirety, as you sometimes have done when requested by local unions.

Although it is possible that the proposed amendments would reduce the number of election complaints emanating from the operation of the 75% attendance requirements, I do not think that your proposal provides an adequate basis for terminating the pending litigation.

Your efforts to resolve this matter are deeply appreciated.

Sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.

[fol. 75]

STATUTES INVOLVED

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 401 et seq., provides in pertinent part:

Declaration of Findings, Purposes, and Policy

Sec. 2(a). The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

Terms of Office: Election Procedures

Sec. 401(b). Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

Sec. 401(e). In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have

been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

Enforcement

Sec. 402(a). A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) [fol. 77] who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

Sec. 402(b). The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States

in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

Sec. 402(c). If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

- (1) that an election has not been held within the time prescribed by section 401, or
- [fol. 78] (2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

[fol. 79]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15759 and 16048

[File Endorsement Omitted]

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO (GBBA)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued November 14, 1966

Before: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT—Filed December 16, 1966

By HASTIE, *Circuit Judge.*

Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 STAT. 519, 534, 29 U.S.C. § 482(b), provides in part that whenever the Secretary of

Labor's investigation of a complaint made by a member of a local union gives him probable cause to believe that rights to be a candidate or to vote in an election of union officers, or to hold union office, as protected by section [fol. 80] 401(b) and (e) of the Act, have been violated, the Secretary "shall . . . bring a civil action against the labor organization . . . to set aside the invalid election . . ." This is such an action. The complaint filed in March, 1964, alleges that, through investigation of a complaint by a union member, the Secretary has found probable cause to believe that Glass Bottle Blowers Local 153 violated section 401(b) and (e) of the 1959 Act in its 1963 nomination and election of union officers. The complaint asks for a judgment "declaring the election held by the defendant union on October 18, 1963, to be null and void" and "directing the conduct of a new election under the supervision of the plaintiff".

After pretrial procedures extending over more than a year, the case was tried to the district court without a jury. In August, 1965, the court filed an opinion and caused judgment to be entered dismissing the complaint. The court found that the union's international constitution and local by-laws unlawfully restricted the eligibility of members to be candidates for union office. However, it also found that the evidence did not establish that this violation "may have affected the outcome" of the 1963 election, a requirement which section 402(c) expressly makes prerequisite to the judicial granting of relief.

The Secretary appealed from this judgment. However, while this appeal was pending, he also sought and obtained from this court an order remanding the cause to the district court, without relinquishing jurisdiction for the review of the original judgment, for the purpose of entertaining and adjudicating a post-judgment motion for further relief.

Upon remand, the Secretary filed a post-judgment motion alleging under oath that the union had elected new officers on October 12, 1965 under the same restrictions upon eligibility for office that had been the subject of the complaint with reference to the 1963 election and asking

[fol. 81] that the 1965 election be invalidated and a new election ordered under the Secretary's supervision. The court denied this motion, ruling on the merits of the motion "that no candidate or candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations".

The case is now before us upon separate appeals from the original judgment and from the order denying the post-judgment motion.

We hold that the 1965 election of officers, as disclosed in the post-judgment motion, made the original action challenging the 1963 election moot. This question has very recently been considered and decided by the Court of Appeals for the Second Circuit. *Wirtz v. Local Unions 410, 410A, 410B, & 410C, Int'l Union of Operating Engineers*, 1966, 366 F.2d 438. That court reasoned as follows:

"The exclusive remedy which Congress has created for challenging a union election, see 29 U.S.C. § 483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election"

" . . . It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, . . . we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot." 366 F.2d at 442.

To us this reasoning is persuasive and requires no elaboration. The Secretary's original action, based upon the 1963 election, is now moot.

We have also considered the so-called post-judgment motion as in substance an amended or supplementary [fol. 82] complaint attacking the 1965 election. However, that new challenge to the 1965 election must fail because no member of the union has filed with the Secretary a complaint seeking to invalidate that election.

For whatever reasons, Congress, in enacting the enforcement provisions contained in section 402, did no more than to provide an administrative and judicial procedure for determining the legality of a particular election of local union officers. The only suit authorized under section 402 is a suit by the Secretary to set aside that election of which an aggrieved unionist has complained. *Wirtz v. Local Unions*, 410, 410A, 410B, 410C, *Int'l. Union of Operating Engineers*, *supra*; *Wirtz v. Local 191, Int'l. Brotherhood of Teamsters*, D.Conn. 1963, 218 F. Supp. 885, *aff'd*, 2d Cir. 1963, 321 F.2d 445. Therefore, absent a complaint by a union member challenging the 1965 election, the Secretary had no authority to sue to establish the invalidity of that election. The denial of the post-judgment motion was proper, although we so decide for a reason different from that given by the court below.

While this action must be dismissed, we think it appropriate to make the additional observation that it is within the power of the Secretary to prevent such a controversy as was presented by his original complaint here from becoming moot. The available remedy, as pointed out by the Court of Appeals for the Second Circuit, is a proceeding "to enjoin a union from holding an election, or from giving effect to one already in process, where it is apparent that the Secretary is likely to succeed in his claim that the election under which the union's officers are currently serving was conducted in violation of the requirements of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481, where the impending balloting is apparently being conducted under substantially similar conditions, where it also appears that such injunction will not cause serious injury to the unions [fol. 83] concerned, and where the Secretary is likely to suffer a very real detriment in his attempt to enforce the law if such restraining order is not granted". See *Wirtz v. Local Unions Nos. 545, 545-A, 545-B and 545-C, Int'l. Union of Operating Engineers*, 2d Cir. 1966, 366 F.2d 435, 436. The court directed that the requested injunction issue.

In addition to granting such relief, we are sure that this court and the district courts in this circuit will, upon

request, expedite the hearing and disposition of cases in which the Secretary challenges the validity of union elections in order that disruptive disputes over the right and title of union officers may not be unduly protracted.

Finally, the Secretary contends that, in ruling adversely upon his contention that the illegal disqualification of candidates "may have affected the outcome" of the 1963 election, the district court misconstrued the statute and treated it as requiring proof that the illegal conduct did in fact affect the outcome of the election. The mootness of the controversy makes it unnecessary to decide that question. However, we think we should not permit the decision below to stand as a precedent on this contested issue which we have declined to review.

Accordingly, the judgment on the merits of the principle controversy and the order denying post-judgment relief will both be vacated and the cause remanded with instructions to dismiss the original complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union member.

* * *

[fol. 84]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15,759 and 16,048

[File Endorsement Omitted]

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v8.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO (GBBA)

(D. C. Civil Action No. 64-278)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIAPresent: MC LAUGHLIN, KALODNER and HASTIE, *Circuit
Judges.*

JUDGMENT—December 16, 1966

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 26, 1965, and the order denying post-judgment relief, filed May 27, 1966, be, and the same are hereby vacated and the cause remanded with instructions to dismiss the original complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union member.

ATTEST:

/s/ [Illegible]
Clerk

December 16, 1966.

Certified as a true copy and issued in lieu of a formal
mandate on January 12, 1967.

Test:

/s/ THOMAS F. QUINN

Clerk

United States Court of Appeals
for the Third Circuit

[fol. 85]

SUPREME COURT OF THE UNITED STATES

No. 1115, October Term, 1966

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

*v.*LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO

ORDER ALLOWING CERTIORARI—May 15, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. —

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF
THE UNITED STATES AND CANADA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 13-17, *infra*) is unreported. The opinion and judgment of the district court (App. C, pp. 19-30, *infra*) are reported at 244 F. Supp. 745. The order of the district court on plaintiff's motion for post-judgment relief (App. D, pp. 31-32, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, p. 18, *infra*) was entered on December 16, 1966. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action by the Secretary of Labor challenging a union election under Title IV of the Labor-management Reporting and Disclosure Act of 1959 is rendered moot if a subsequent election is held by the defendant union.¹

STATUTE INVOLVED

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, are set forth in Appendix F, pp. 44-47, *infra*.

STATEMENT

The Secretary of Labor instituted this action on March 31, 1964, under Section 402 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 482, requesting an order setting aside an election conducted by the respondent union on October 18, 1963, and directing that a new election, to be supervised by the Secretary, be held. The complaint specified that the union had violated Section 401(e) of the Act, 29 U.S.C. 481(e), which directs that every member of a labor organization subject to the Act "be eligible to be a candidate and to hold office (subject to * * * reasonable qualifications uniformly imposed) * * * " (p. 44, *infra*). It was stipulated

¹ If certiorari is granted, we also reserve the right to argue the question not reached by the court below—*i.e.*, whether the Secretary failed to establish that the violation of the Act "may have affected the outcome" of the election within the meaning of Section 402(c)(2), 29 U.S.C. 482(c)(2).

that the union constitution and bylaws required candidates for union office to have attended 75 percent of the monthly union meetings in the two years prior to the election, that members were not excused on account of illness but only if they were required to be at work when the union meetings were held, and that excuses had to be submitted in writing to the union's secretary within 72 hours of the missed meeting. As a consequence of these requirements, it was stipulated, only 11 members of the 500-member union were eligible to run for office in 1963 (R. 31a-33a).²

This action was instituted after the Secretary had received and investigated a complaint from a union member who was disqualified as a candidate because he had attended only 17 of the 24 relevant monthly meetings. The minutes of one of the seven meetings which he missed indicated that the complaining member had been hospitalized on the occasion of that meeting (R. 32a-33a). The union had failed to act on the member's internal complaint (R. 29a-30a).

The district court held that the 75 percent attendance requirement violated the "reasonable qualification" provision of Section 401(e) because 75 percent was too high a percentage, the provision governing excuses was too limited and the effect of the rule was too restrictive (pp. 19-29, *infra*). Notwithstanding this conclusion, the court denied the relief requested by the Secretary on the ground that the plaintiff had failed to establish that the violation "may have af-

²"R." refers to the Appendix to the Secretary's brief in the court of appeals.

fected the outcome" of the election as required by Section 402(c)(2) (p. 46, *infra*). The court noted that the complaining member had voluntarily absented himself from other meetings when he was not ill, and held that his failure to qualify was therefore attributable to a factor other than the unreasonable requirement (p. 29, *infra*). It therefore dismissed the complaint, although it "retain[ed] jurisdiction" for further action "in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union" (p. 30, *infra*). The Secretary appealed from the judgment of dismissal.

The union's next regular election was held in October 1965. On the Secretary's motion, the court of appeals remanded the case to the district court for it to take evidence concerning that election (R. 44a). The Secretary submitted to the district court an affidavit stating that the 75 percent attendance requirement had remained in effect during the 1965 election; that only 2.6 percent of the membership was therefore eligible to run for office; that only eight candidates ran for the eight union offices (only one running for president and no candidates being nominated for three of the offices); that no members were nominated who were ineligible under the 75 percent rule; and that the rule was not waived on behalf of any nominee (R. 47a-50a). The district court denied the Secretary's motion to have the 1965 election declared invalid (pp. 31-32, *infra*).

Relying on the decision of the Court of Appeals for the Second Circuit in *Wirtz v. Local Unions 410, 410A,*

410B & 410C, International Union of Operating Engineers, 366 F. 2d 438 (App. E, pp. 33-43, *infra*), the court of appeals held that the challenge to the 1963 election was mooted by the intervening 1965 election. The court also held that it was proper to deny relief as to the 1965 election because no complaint had been received by the Secretary of Labor with regard to that election (pp. 15-16, *infra*).

REASONS FOR GRANTING THE WRIT

In deciding that the intervening union election rendered the Secretary's action moot, the court below misapprehended the nature of the remedy afforded by Title IV of the Labor-Management Reporting and Disclosure Act and arrived at a result which would make the rights protected by that title virtually unenforceable. The Second and Sixth Circuits have recently reached the same conclusion as the court below,³ and unless this trend of decisions is reversed the remedial statutory provisions enacted by Congress in 1959, after substantial legislative investigation and debate, will come to naught.

1. The court of appeals committed a fundamental error in reading the statute; it accorded to the Secre-

³ *Wirtz v. Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers*, 366 F. 2d 438 (C.A. 2), Appendix E, pp. 33-43, *infra*; *Wirtz v. Local Union No. 125, Labbrers' International Union of North America, AFL-CIO*, decided December 15, 1966 (C.A. 6). We are today filing a petition for a writ of certiorari in the latter case. We are not seeking review of the Second Circuit decision because that litigation has been dismissed under the terms of an agreement between the Secretary and the International Union of Operating Engineers which incorporates remedial provisions for the future.

tary only half the remedial powers conferred upon him by Section 402(b). The statute (p. 46, *infra*) authorizes the Secretary to bring a civil action (1) "to set aside the invalid election, if any," and (2) "to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe." The court below assumed that merely because it would serve no purpose to declare the 1963 election invalid, the Secretary's entire action became moot. The statute did more, however, than merely entitle the Secretary to maintain actions to invalidate elections; it authorized him, whenever an invalid election had been held, to obtain a court order directing a remedial supervised election. That remedy is available and appropriate even if the terms of the officers chosen by the invalid election have expired.

It is clear from the legislative history of the Labor-Management Reporting and Disclosure Act that the remedial provisions of Title IV were designed to protect the public interest in democratic labor unions and not merely to enforce an individual right asserted by a complaining union member. See S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 20. It was to protect the public interest along with the right of union members to free and fair elections that Congress authorized the Secretary to bring suit to invalidate an unlawful election and to conduct a supervised one. Congress' purpose in adding the supervised election—which must comply not only with the statute itself but

also with "such rules and regulations as the Secretary may prescribe"—as a remedy must have been to undo the possible lasting effects of an invalid and unlawful election. Those effects are not dissipated merely because the union has held a subsequent election.

The facts of this case demonstrate persuasively why a supervised election is a necessary and integral element of the relief provided by the Act. The Secretary proved on remand that at the union's 1965 election the same unreasonable provision of the union's bylaws had been in effect and that, as a consequence, only 13 of 500 members were eligible to run for office. Only 8 candidates actually ran, and no one who failed to meet the 75 percent attendance provision was even nominated. It is a fair inference that the outstanding bylaw was a deterrent to other potential candidates who might have sought to run if it had been clearly established that the condition was impermissible. Indeed, even if the union had not actually applied its unlawful condition of candidacy, there would have been no way of being certain, short of a supervised election, that the union members had been adequately notified of the elimination of the unreasonable attendance requirement.

An even more basic justification for a supervised election, which applies irrespective of whether an unreasonable qualification was imposed during the intervening vote, is the importance of overcoming the inherent advantages which the unlawfully elected officers enjoy as incumbents. The procedures which the Secretary utilizes in conducting a supervised elec-

tion are designed to eliminate or minimize such unfair advantages. Without supervised elections, those who have been illegally chosen might perpetuate themselves in office through their control of the election machinery, using techniques which are not demonstrably unlawful but which nonetheless favor incumbents. If no supervised election is conducted to break this cycle of control, a single invalid election may taint several which follow it.*

The court of appeals was wrong, therefore, in concluding that merely because the allegedly invalid election had been superseded, the Secretary was entitled to no relief. If, as was alleged in the complaint, the

* The details of a union election are usually controlled by an election committee or similar body, and incumbent officers may be members of the committee. At a supervised election, the principal details of the election procedure are determined by the Department of Labor's supervisor, in consultation with all interested parties at a pre-election conference. Details remaining unsettled after the pre-election conference may be left to a union election committee, but the supervisors are instructed that incumbent officers seeking re-election, as well as other candidates for office, are not to serve on the election committee. Where the union's constitution requires incumbent officers to perform functions in connection with the election, the supervisors are instructed that the incumbent seeking re-election must do so under supervision and, upon request, under observation of representatives of rival candidates.

An example of an election procedure which may affect the outcome of a close race is placement of the candidates' names on the ballot, the first place being generally considered preferable. Some unions list candidates in order of nomination. This frequently results in incumbents being listed first because the incumbent officer who chairs the nomination meeting may recognize the nominators of his own slate first. The Department of Labor supervisors are instructed that alphabetical listing on the ballot, or a listing based on chance, is preferable.

1963 election was unlawfully conducted, a supervised election should have been ordered. The fact that the union conducted a regular election in the interim did not obviate the need for that remedy.

2. If the circumstances on which the court below relied are sufficient to render the case moot, very few, if any, actions brought by the Secretary to effectuate the voting rights enumerated in Title IV can be prosecuted to a successful conclusion. The Act itself requires unions to hold elections at least once every three years (29 U.S.C. 481(b)); many unions (including respondent) hold them biannually, and some even conduct annual elections. The Secretary cannot, under normal circumstances, institute an action in a district court until six months after an election.⁵ In most cases, a trial is necessary, so that even the district court's judgment may be delayed until after the following regular election. And if appeals are prosecuted, it becomes virtually impossible to terminate the litigation (including action on an application for review by this Court) before the next biannual or even triannual union election. This situation obviously will be further aggravated if defendant unions know that they can moot these lawsuits by delaying the proceedings until their next election is held.

At the present time there are 28 actions of this kind pending in the district courts; three others have

⁵ The union has three months after the invocation of internal remedies in which to render a final decision. 29 U.S.C. 482(a). The union member then has one month in which to file a complaint with the Secretary. *Ibid.* The Secretary then has sixty days for the administrative investigation which is required prior to bringing suit. 29 U.S.C. 482(b).

been recently dismissed as moot on the authority of the decisions in this and the related cases. Two of the 28 cases are also subject to dismissal on the same ground, as is one case now pending in a court of appeals. In five other district court cases, the union is scheduled to hold its next regular election during this year. In all the remaining cases elections are to be held in 1968 or 1969, and the prospects for terminating the litigation, including appellate review, before these elections are held are exceedingly slim. Consequently, the Secretary faces the prospect of wholesale dismissal of these lawsuits before they reach final judgment.

It is no answer to suggest, as the court below and the Second Circuit have done, that the Secretary should obtain temporary injunctions against elections which might moot such actions. While the Act does not explicitly authorize injunctions prohibiting the holding of union elections, the Court of Appeals for the Second Circuit has directed the issuance of such an injunction. *Wirtz v. Local Unions Nos. 545, 545-A, 545-B & 545-C, International Union of Operating Engineers*, 366 F. 2d 435. In any event, by taking such a step the Secretary is, in effect, asking a court to maintain in office the very union officials whose election he is challenging. Congress surely did not contemplate placing the Secretary in that anomalous position in order to obtain an adjudication of his challenge to an election and his demand for a supervised ballot.

Nor is the policy of the Act served by encouraging the Secretary to act in haste. The Secretary is directed by 29 U.S.C. 482(b) to ascertain whether violations disclosed by his investigation have been remedied.

He may then bring suit if he does not obtain voluntary compliance with the terms of the statute.⁶ See *Calhoon v. Harvey*, 379 U.S. 134, 140. Settlement efforts frequently take time, and the Secretary may obtain waivers in order to permit the negotiations to extend past the sixty-day period prescribed by the Act for bringing suit.⁷ The possibility of mootness, however, would encourage the Secretary to file suit as quickly as possible, regardless of the effect on settlement efforts.⁸ The net effect would be to postpone, and perhaps to frustrate permanently, the correction of undemocratic election procedures which might otherwise be achieved by voluntary compliance.⁹

⁶ In fiscal years 1963, 1964 and 1965, an average of 31 complaints per year were disposed of through voluntary compliance, while an average of 17 suits per year were filed. See Bureau of Labor-Management Reports, *Summary of Operations, 1963*, at p. 11; U.S. Department of Labor, *Summary of Operations, 1964, Labor-Management Reporting and Disclosure Act*, at p. 6; U.S. Department of Labor, *1965 Summary of Operations, Labor-Management Reporting and Disclosure Act*, at p. 7.

⁷ In some cases, the holding of a supervised election is part of the settlement. Considerable time must be taken in preparing for the supervised election, during which time the Secretary preserves his right to file a complaint by obtaining waivers of the limitations defense.

⁸ Settlement efforts may, of course, continue after the filing of a suit. However, the commencement of litigation generally hardens the position of the parties and makes settlement more difficult. Before suit is filed, the union may be amenable to settlement because it wishes to avoid the adverse publicity of a lawsuit. This factor, of course, disappears once the suit is filed.

⁹ The district court also erroneously decided the question not reached by the court of appeals which we reserve for argument if certiorari is granted (note 1, *supra*). The standard of the statute is satisfied if it is possible that the violation affected the election. The words "may have affected" were in-

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1967.

serted in the statute precisely to overcome the very strict proximate-cause approach adopted by the district court. Senator Goldwater analyzed the provision as follows (105 Cong. Rec. 19765) :

The Kennedy-Ervin bill (S. 505), as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless. Minority members in committee secured an amendment correcting this glaring defect and the amendment is contained in the conference report.

The Second Circuit has also disagreed with the result reached here by the district court. *Wirtz v. Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers*, 366 F. 2d 438, pp. 39-41, *infra*.

APPENDIX A

[Caption Omitted]

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed December 16, 1966)

By HASTIE, *Circuit Judge*: Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 534, 29 U.S.C. § 482(b), provides in part that whenever the Secretary of Labor's investigation of a complaint made by a member of a local union gives him probable cause to believe that rights to be a candidate or to vote in an election of union officers, or to hold union office, as protected by section 401 (b) and (e) of the Act, have been violated, the Secretary "shall * * * bring a civil action against the labor organization * * * to set aside the invalid election * * *." This is such an action. The complaint filed in March, 1964, alleges that, through investigation of a complaint by a union member, the Secretary has found probable cause to believe that Glass Bottle Blowers Local 153 violated section 401 (b) and (e) of the 1959 Act in its 1963 nomination and election of union officers. The complaint asks for a judgment "declaring the election held by the defendant union on October 18, 1963, to be null and void" and "directing the conduct of a new election under the supervision of the plaintiff".

After pretrial procedures extending over more than a year, the case was tried to the district court without a jury. In August, 1965, the court filed an opinion and caused judgment to be entered dismissing the complaint. The court found that the union's international constitution and local by-laws unlawfully restricted the eligibility of members to be candidates for union office. However, it also found that the evidence did not establish that this violation "may have affected the outcome" of the 1963 election, a requirement which section 402(c) expressly makes prerequisite to the judicial granting of relief.

The Secretary appealed from this judgment. However, while this appeal was pending, he also sought and obtained from this court an order remanding the cause to the district court, without relinquishing jurisdiction for the review of the original judgment, for the purpose of entertaining and adjudicating a post-judgment motion for further relief.

Upon remand, the Secretary filed a post-judgment motion alleging under oath that the union had elected new officers on October 12, 1965 under the same restrictions upon eligibility for office that had been the subject of the complaint with reference to the 1963 election and asking that the 1965 election be invalidated and a new election ordered under the Secretary's supervision. The court denied this motion, ruling on the merits of the motion "that no candidate or candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations."

The case is now before us upon separate appeals from the original judgment and from the order denying the post-judgment motion.

We hold that the 1965 election of officers, as disclosed in the post-judgment motion, made the original

action challenging the 1963 election moot. This question has very recently been considered and decided by the Court of Appeals for the Second Circuit. *Wirtz v. Local Unions 410, 410A, 410B, & 410C, Int'l. Union of Operating Engineers*, 1966, 366 F. 2d 438. That court reasoned as follows:

The exclusive remedy which Congress has created for challenging a union election, see 29 U.S.C. § 483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election * * *

* * * It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election * * * we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot. 336 F. 2d at 442.

To us this reasoning is persuasive and requires no elaboration. The Secretary's original action, based upon the 1963 election, is now moot.

We have also considered the so-called post-judgment motion as in substance an amended or supplementary complaint attacking the 1965 election. However, that new challenge to the 1965 election must fail because no member of the union has filed with the Secretary a complaint seeking to invalidate that election.

For whatever reasons, Congress, in enacting the enforcement provisions contained in section 402, did no more than to provide an administrative and judicial procedure for determining the legality of a particular election of local union officers. The only suit authorized under section 402 is a suit by the Secretary to

set aside that election of which an aggrieved unionist has complained. *Wirtz v. Local Unions 410, 410A, 410B, 410C, Int'l. Union of Operating Engineers, supra; Wirtz v. Local 191, Int'l. Brotherhood of Teamsters*, D. Conn. 1963, 218 F. Supp. 885, aff'd, 2d Cir. 1963, 321 F. 2d 445. Therefore, absent a complaint by a union member challenging the 1965 election, the Secretary had no authority to sue to establish the invalidity of that election. The denial of the post-judgment motion was proper, although we so decide for a reason different from that given by the court below.

While this action must be dismissed, we think it appropriate to make the additional observation that it is within the power of the Secretary to prevent such a controversy as was presented by his original complaint here from becoming moot. The available remedy, as pointed out by the Court of Appeals for the Second Circuit, is a proceeding "to enjoin a union from holding an election, or from giving effect to one already in process, where it is apparent that the Secretary is likely to succeed in his claim that the election under which the union's officers are currently serving was conducted in violation of the requirements of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481, where the impending balloting is apparently being conducted under substantially similar conditions, where it also appears that such injunction will not cause serious injury to the unions concerned, and where the Secretary is likely to suffer a very real detriment in his attempt to enforce the law if such restraining order is not granted". See *Wirtz v. Local Unions Nos. 545, 545-A, 545-B and 545-C, Int'l. Union of Operating Engineers*, 2d Cir. 1966, 366 F. 2d 435, 436. The court directed that the requested injunction issue.

In addition to granting such relief, we are sure that this court and the district courts in this circuit will, upon request, expedite the hearing and disposition of cases in which the Secretary challenges the validity of union elections in order that disruptive disputes over the right and title of union officers may not be unduly protracted.

Finally, the Secretary contends that, in ruling adversely upon his contention that the illegal disqualification of candidates "may have affected the outcome" of the 1963 election, the district court misconstrued the statute and treated it as requiring proof that the illegal conduct did in fact affect the outcome of the election. The mootness of the controversy makes it unnecessary to decide that question. However, we think we should not permit the decision below to stand as a precedent on this contested issue which we have declined to review.

Accordingly, the judgment on the merits of the principal controversy and the order denying post-judgment relief will both be vacated and the cause remanded with instructions to dismiss the original complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union member.

A True Copy.

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

APPENDIX B

[Caption Omitted]

Present: McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 26, 1965, and the order denying post-judgment relief, filed May 27, 1966, be, and the same are hereby vacated and the cause remanded with instructions to dismiss the original complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union member.

Attest:

IDA O. CRESKOFF, Clerk.

DECEMBER 16, 1966.

(18)

APPENDIX C

[Caption Omitted]

OPINION OF DISTRICT COURT, FILED AUGUST 26, 1965

Dumbauld, J.

The question for decision here is whether a provision requiring attendance at 75% of the regular meetings of a union for a two-year period since the last previous election in order to be eligible as a candidate for office in the union is or is not among the "reasonable qualifications" permitted by Section 401(e) of the Labor-Management Reporting and Disclosure Act of September 14, 1959 (commonly known as the Landrum-Griffin Act), 73 Stat. 532, 29 U.S.C. 481(e).

That section provides:

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and *every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed)* and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof.¹

¹ Italics supplied. Section 504, not pertinent here, prohibits holding of union office by Communists or convicts guilty of certain crimes. Incidentally, section 504 was held unconstitutional.

Section 402, 29 U.S.C. 482, provides enforcement procedure. Upon investigation of a complaint duly filed by a member of a labor organization, the Secretary of Labor, if he finds probable cause to believe that a violation of the election provisions of the Act has occurred and has not been remedied, may bring a civil action, against the union as an entity, to set aside the election and direct the conduct of an election under supervision of the Secretary.

If, upon a preponderance of the evidence after a trial upon the merits, the Court finds that the violation of Section 401, "may have affected the outcome of an election," the Court shall declare the election to be void and direct the conduct of a new election under the supervision of the Secretary.

It will be noted that the Court, in order to declare the election void, must find not only the existence of a violation but that the violation may have affected the outcome of the election.

The Court is vested with specific statutory jurisdiction in a proceeding *de novo* styled a civil action. This remedy is exclusive. *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964).

The Court is not exercising the function of judicial review of an administrative agency; where the doctrine of "primary jurisdiction" would apply, and the scope of review would ordinarily be limited to the question of whether there was error or lack of substantial evidence to support the agency's conclusions. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907); *Rochester Tel. Corp. v. U.S.* 307 U.S.

tional by the Supreme Court in *U.S. v. Brown*, 381 U.S. 437, 449 (1965) as being a bill of attainder (or legislative trial) at least as far as Communists are concerned. Perhaps convicts can still be excluded from union office [as they can be from the practice of medicine, *Hawker v. New York*, 170 U.S. 189, 191, 196 (1898)], as they must necessarily have had a judicial trial.

125, 139-40 (1939); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-88 (1951).

Here it can in no wise be contended, as Judge Learned Hand does in the instance of due process, that the courts are usurping power of the same sort which legislators exercise (though such usurpation is justified in order to prevent frustration of the governmental enterprise). Hand, *The Bill of Rights*, 29, 39 (1958). In our situation the power of the courts is expressly delegated by statute, and simply serves to bring into sharper focus a telescope which has already been pointed by Congress toward the desired objective. *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 329 (1936).

We are therefore authorized to exercise a legitimate discretion with respect to the intrinsic propriety, wisdom, or expediency of the regulations under consideration when determining their reasonableness, and not merely to pass judgment on the issue of bare power as to whether another agency of government has acted *ultra vires*. Stated differently, the distinction may be illustrated by saying that our function is somewhat comparable to an appeal in equity as distinguished from a writ of error, or to a direct appeal as distinguished from the collateral review permitted under the traditional or classical writ of habeas corpus. We must determine for ourselves on the merits the substantive question whether the result reached is right rather than merely the formal question whether someone else had power to pronounce and declare that it was right.

The By-Laws of defendant Local Union No. 153 of the Glass Bottle Blowers Association provide, in Article 2, sec. 1 that regular meetings will be held the second Thursday of each month at 8:00 P.M., unless otherwise directed. Articles 3 and 4 provide that all

offices shall be elected, by secret ballot, for a term of two years. [This is in conformity with the requirements of 29 U.S.C. 481(b)].

Article 4, sec. 12, is the crucial provision in this case. It ordains that: "No members [sic] may be a candidate unless said member is in good standing and has attended seventy-five (75%) of the regular local meetings since the last local election." This is supplemented by Art. 4, sec. 13, which provides that: "In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting."

Local 153 has approximately 500 members, of whom 11 (or 2.2 percent) were eligible for office at the challenged election held on October 18, 1963. The eligible list of eleven included the names of one Paul Gamber ("if he attends the next 2 meetings") and of one John L. Miller (with the notations "Under investigation" or "Under consideration by International"). The International on August 8 and 21, 1963, informed Miller that he was ineligible, by reason of failure to meet the attendance requirement. Miller had been Treasurer, and was proposed for nomination as President and as Treasurer at the 1963 election, but held to be disqualified under the By-Laws. Upon Miller's complaint, the Secretary of Labor filed the instant suit.

By reason of rotation in shifts, 469 members of the union are required to be at work on the date of union meetings at least six times during the two-year period of eligibility determination. Defendant computes that this means that as to 93.8% of the members, by virtue of the excusal provisions of Art. 4, Sec. 13, the 75% attendance requirement is reduced to a

50% requirement (Brief, p. 3). However, with respect to 31 workers not on rotating shifts, the 75% requirement is fully applicable without any abatement.

In view of the policy of the Act to promote equal rights among union members [29 U.S.C. 411(a)(1)] and of the terms of Section 401(e) itself, it would appear that the rights of individual members as such are at issue, and hence that we must consider the effect of the challenged By-Law in accordance with its literal terms, and as applied to the minority of members upon whom it bears hardest. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713 736-37 (1964).

Plaintiff urges in support of its view the following language from Regulations issued by the Secretary issued on December 12, 1959, 29 C.F.R. 452.7(b):

(b) The question of whether a qualification is reasonable is a matter which is not susceptible to precise definition and in the last analysis will be determined by the courts. Under certain circumstances a prerequisite for such candidacy may on its face appear to be reasonable, but this would not be controlling if, as a matter of fact, the effect of its application would be unreasonable and inharmonious with the intent of the Act's election provisions. For example, a requirement that to be eligible to be a candidate for office an individual must have been a "member in good standing" for a prescribed period of time, such as two or three years, would not be, in many instances, an unreasonable qualification. However, should the actual effect of such qualification in a particular case be to disqualify from holding office all but a handful of the labor organization's members, its reasonableness would be subject to serious question.

As plaintiff contends, the views of the Secretary are of great weight. Not only does this Court have great respect for the Secretary, but this Court agrees 100% with every word that is said in the quoted passage. The trouble is that all that is said is that the question of reasonableness is a difficult one and must ultimately be decided by the courts in the light of the facts in particular cases. We agree.

Defendant argues that the test of reasonableness here is the same as that when the constitutionality of legislation is challenged under the due process clause: in other words, that the "rational basis" rule applies. That is to say, the By-Law as adopted by the union must be upheld if a reasonable mind would have a good reason for adopting it. It must be upheld if it is rationally relevant to a legitimate regulatory purpose. As stated by Chief Justice Warren in *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954): "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." A court does not act as a "superlegislature" to weigh the wisdom of regulations. *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423, 427 (1952); *Ferguson v. Skrupa*, 372 U.S. 726, 729-32 (1963).

It is then argued that such a good reason is to encourage participation in union affairs and attendance at meetings in order to become familiar with the workings of the organization before undertaking to serve as a union officer.

Another analogous situation in which courts pass on "reasonableness" is in Antitrust cases. Here, however, the insertion of that standard into the legislation as enacted by Congress is a pure judicial crea-

tion devised first by Mr. Chief Justice White in *Standard Oil Co. v. U.S.*, 221 U.S. 60, 63-67 (1911).

More to the point is the analogy to the function of the Interstate Commerce Commission, and similar regulatory agencies, in establishing "just and reasonable" rates. 49 U.S.C. 15. In other words, Congress itself enacts a nonspecific standard, the application of which to specific situations is entrusted to the judicial process of inclusion and exclusion.

The Court therefore in a particular case must not only consider the existence *vel non* of a scintilla of rational support for the rule put forth, but must (by a process similar to that prescribed in the *Universal Camera* case), take into consideration the entire situation presented by the record, and give due weight to every aspect of the facts established. In other words, the Court must also inquire whether the legitimate purpose sought to be achieved could be attained in a manner less destructive of other legally protected interests. *Schneider v. Irvington*, 308 U.S. 147, 162 (1939); *Henry v. Mississippi*, 379 U.S. 443, 447-49 (1965). We note that there may be a fairly extensive "zone of reasonableness" and that comparison with comparable practices may be a standard for determining reasonableness. *Georgia v. P.R.R. Co.*, 324 U.S. 439, 460-61 (1945); *Youngstown Sheet & Tube Co. v. U.S.*, 295 U.S. 476, 480 (1935).

Moreover, the determination must seek to give effect to the policies of the Act. Reasonableness is not to be assessed *in vacuo*, but in the light of the purposes which the Congress sought to achieve and the evils which it sought to eliminate. Union democracy, effective self-government, abolition of oligarchical cliques and self-serving union officers were in the forefront of Congressional thinking. Section 401 itself seeks to open the path of eligibility to office to all union mem-

bers in good standing, except where restrictions of reasonable character, and uniformly imposed, may be appropriate. *Mamula v. Steelworkers*, 304 F. 2d 108, 110-111 (1962); 86th Cong. 1st Sess. S. Rep. No. 187, p. 20, appearing at p. 16 of Vol. 1 of *Legislative History* of the Act, published by the NLRB, Washington, 1959. It must also be remembered that restrictions on eligibility also constitute a corresponding restriction on the right of choice by other members. *Fogle v. Steelworkers*, 230 F. Supp. 797, 798 (W.D. Pa. 1964).

Plaintiff argues that the 75% requirement has no rational relation to any legitimate labor union objective. This contention in its broad form is obviously untenable, as it is a very proper objective to encourage attendance at union meetings, and to require office holders to have acquired a sufficient familiarity with union affairs to be properly qualified to discharge their trusts effectively and in keeping with the sentiments of the membership. Past conduct is often a proper test of future fitness. [See cases collected in Dumbauld, *The Constitution of the United States* (1964) 199-200.

Plaintiff stands on more solid ground in arguing that the requirement *goes too far*. This contention is three-pronged: (1) 75% is too high a percentage; (2) the provision for excuses is too rigid, being limited only to work on the job during meetings; (3) the effect of the rule as applied here results in "only a handful" of eligibles (2.2% of membership qualified).

To select a particular percentage of attendance as being reasonable and hence permissible is akin to the task of determining what percentage of market control is necessary to establish the existence of a monopoly. On this issue a revered Judge, Learned Hand, once said "it is doubtful whether sixty or sixty-four percent would be enough, and certainly thirty-three percent is not." Ninety was enough, however. U.S.

v. Aluminum Co. of America, 146 F. 2d 416, 424 (C.C.A. 2, 1945). We conclude that 75 is too high a percentage when combined with the strict rule regarding excuses.

To be reasonable a rule must give appropriate recognition to human nature and the normal needs of a workman in his everyday life. Union members can not be expected to devote undeviating attention to union business, to the neglect of their health, family obligations, vacations and the usual pleasures and vicissitudes of life. They do not form a military community or a religious order, separated from the world at large.

A rule which limits the eligible group to 2.2% of the membership seems to be too harsh. The only judicial precedent cited by counsel is *John C. Martin v. Boilermakers*, W.D. Pa., Civil No. 969 Erie, where on June 26, 1963, my esteemed colleague Judge Willson upheld the reasonableness of the eligibility requirements of that union's constitution. However, the requirement there was only one meeting out of each quarter of the calendar year and the quarter immediately preceding nominations. Moreover, the provision for excuses was liberal: it recognized "personal illness, International or District or Local Lodge duties, regular employment or some other unavoidable situation." There 14 members out of a total of 175 were found to be qualified (a figure in excess of 10% of the membership).

Under these circumstances, Judge Willson said (and I agree):

Plaintiff, however, seems to make a blank charge that the amendment requiring the attendance at one meeting during each of the five quarters to become eligible to hold office is, per se, an unreasonable regulation. However, this contention, if seriously made, is rejected be-

cause it seems very clear to the court that the regulation is reasonable. Certainly there is nothing illegal about it, not [sic] does it appear burdensome. The rule is almost the minimum attendance requirement. It simply requires that a member attend one meeting in each three month period. But, it is to be noticed that he may be excused from that by illness or if his work interferes. The language which justifies no attendance is broad. It says: "and (d) have attended at least one (1) meeting out of each quarter of the calendar year and the quarter immediately preceding nominations for office unless prevented by personal illness, International or District or Local Lodge duties, regular employment or some other unavoidable situation." (Article XXVIII, p. 111.) To hold that such a regulation is unreasonable would hold in effect that there can be no attendance requirement whatever in this union. I find the regulations as adopted at the International Convention to be reasonable in all respects.

In order for there to be a real choice in the selection of officers, a system of screening ought to produce as eligibles at least twice the number of officers to be elected. Out of the air, I should take 10 percent of the membership as the minimum number from which nominations and elections are to be made.

Art. 3, sec. 1, of defendant's By-Laws, provides for the election of ten officers. The eligible list included only eleven names (including Gamber and Miller, thus ultimately nine or ten). This did not give the members a chance to choose between two full slates. In fact there were no candidates for four offices, and the present incumbents thereof are serving by appointment to fill vacancies, in apparent violation of

Art. 3, sec. 8, which calls for a special election from eligible candidates. But the paucity of eligible candidates would result in impossibility of performance if the procedure of Art. 3, sec. 8, were adhered to. The majority of the members preferred to avoid the expense of a special election and International representative Bonus recommended that the appointed officers continue to serve as "those members appointed will cooperate with us, if necessary, at anytime." Stipulation, Ex. D, E, and G.

Considering the combined effect of the three objections urged by plaintiff, we conclude that the requirements imposed by the By-Laws are not "reasonable qualifications" within the meaning of Section 401(e).

That is not the end of the matter, however. To direct a new election the Court must find that the violation of Section 401(e) "may have effected the outcome of an election." As was true in *Wirtz v. Hod Cariers*, 211 F. Supp. 408, 413 (W.D. Pa. 1962), this factor of causation has not been adequately established.

The evidence shows that complainant Miller voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-Laws but to his own voluntary unwillingness to comply therewith.

Hence it seems inadvisable to decree the holding of a new election. It will be preferable to await appropriate action enabling the next election to be held in full conformity with the Act as judicially expounded.

Each case is remanded with instructions to vacate its dismissal on the merits and to dismiss each complaint as moot.

ARTHUR S. OLICK, Assistant United States Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney and Robert E. Kushner, Assistant United States Attorney, Southern District of New York and Justin J. Mahoney, United States Attorney, Northern District of New York, on the brief), *for plaintiff-appellant.*

BERNARD T. KING, Syracuse, New York (Blitman, Carrigan & King and Nathan H. Blitman, on the brief), *for defendant-appellee Local Unions 410, 410A, 410B, and 410C, International Union of Operating Engineers.*

WILLIAM J. CORCORAN, New York, N.Y., *for defendant-respondent Local 30, International Union of Operating Engineers.*

LUMBARD, *Chief Judge:* These are two separate suits brought by the Secretary of Labor against locals of the International Union of Operating Engineers (IUOE) to set aside 1962 union elections on the ground that provisions of the IUOE's constitution, as adopted and applied by the locals, violated § 401(e) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), by depriving union members of a "reasonable opportunity" to be candidates for union office. Both district courts¹ held that the Secretary had failed to prove that any violations of the Act "may have affected the outcome" of the elections in question. 29 U.S.C. § 482(c)(2). Each

¹ The Local 30 case was decided by the United States District Court for the Southern District of New York, 242 F. Supp. 631 (1965). The Local 410 case was decided by the United States District Court for the Northern District of New York, 61 LRRM 2396 (1965).

local conducted an election in 1965 subsequent to the district court decision in its favor. As we hold that this fact has made both appeals moot, the two cases will be treated together in this opinion. Each case is remanded with instructions to the district court to vacate its dismissal on the merits and to dismiss the complaint as moot.

I

Local 30 is a union of licensed Stationary Engineers (those in charge of boilers, engines, pumps and refrigeration equipment in industrial plants) located in New York City and affiliated with IUOE. Local 410, located in Binghamton, New York, is an IUOE affiliate composed of journeymen engineers who operate power cranes, shovels and similar heavy equipment.

Affiliated locals must adopt the provisions of IUOE's constitution pertaining to the eligibility of union members for union office. The constitutional qualifications which prospective candidates must possess include the following:

- (a) "Continuous good standing" for one year, i.e., payment of union dues on or before the first day of each month of the entire year preceding the election.
- (b) The filing of a "declaration of candidacy" on or before January 15th of the election year.
- (c) The filing of a non-Communist affidavit.
- (d) Attendance at a majority of the regular meetings held between his declaration of candidacy and the election date.²

After Local 30 and Local 410 held elections in 1962 in which incumbent officers and "close associates" were elected without opposition, union members who

² Article XXIII, Subdivision 1, Section (b). The filing date was changed to March 15 in 1964.

had been rejected as candidates because of their failure to comply with the above requirements lodged complaints with their respective locals and, when their IUOE remedies were exhausted unsuccessfully, protested to the Secretary that they had been illegally deprived of their right to stand for office. These complaints being timely, see 29 U.S.C. § 482(a)(1), the Secretary investigated the challenged elections and brought these suits to have them set aside and conducted again under his supervision. 29 U.S.C. § 482(b).

The complaint against Local 410 charged that its "continuous good standing" rule was not a "reasonable qualification uniformly imposed," 29 U.S.C. § 481(e), and hence that members of the local had been deprived of their right to seek office. The complaint against Local 30 charged that its "declaration of candidacy" rule was likewise unreasonable and in addition, that Local 30 had failed to give its members adequate notice of the 1962 election so that prospective candidates might comply with this rule. Judge Metzner agreed that the declaration of candidacy rule violated § 481(e) but held that the Secretary had failed to prove that enforcement of that rule may have affected the outcome of Local 30's election. Judge Port also dismissed the complaint against Local 410 on this ground; he assumed without deciding that the continuous good standing rule violated the Act.

Shortly after the decisions of the district courts, both locals held 1965 elections in accordance with the IUOE constitution and the LMRDA's requirement that elections be held at least triennially. 29 U.S.C. § 481(b). Thus, the present officers of each local are not holding office pursuant to the challenged 1962 elections. We conclude that, in light of the statutory

scheme in question, these subsequent elections render both cases moot.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). Since the rights of litigants are affected by the judicial remedies available, in evaluating whether a particular appeal has become moot, attention must be focused on the particular relief sought by the appellant. See generally Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125 (1946).

The exclusive remedy which Congress has created for challenging a union election, see 29 U.S.C. § 483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election. This suit may only be brought after a union member has made a proper complaint to the Secretary and after the Secretary has made a finding of probable cause to believe that a violation of § 481 has occurred. Congress intentionally created a narrow remedy under Title IV of the LMRDA so that interference with union elections and management would be kept at a minimum. See *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964).

In these two cases, the Secretary has no standing to attack the 1965 elections since no member of Local 30 or of Local 410 has filed a valid complaint challenging them. See *Wartz v. Local No. 125*, 231 F. Supp. 590 (N.D. Ohio 1964). It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, cf. *Cal-*

UDGMENT

AND now, this 26th day of August, 1965, after trial and hearing argument of counsel and receipt of briefs, for the reasons set forth in the foregoing opinion.

IT IS ADJUDGED, DECREED, AND FINALLY DETERMINED that the action herein be and the same hereby is dismissed, the Court retaining jurisdiction of the cause for such further action, if any, as may be required in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union.

(S) DUMBAULD,
United States District Judge.

APPENDIX D

[Caption Omitted]

ORDER OF COURT

AND now, this 27th day of May, 1966, upon consideration of plaintiff's motion for post-judgment relief, after hearing and argument, and it appearing that the purpose of the language in this Court's judgment of August 26, 1965, "retaining jurisdiction of the cause for such further action, if any, as may be required in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union" was to expedite and accelerate the remedying of such future complaints as might arise out of future grievances involving alleged violations of the Act of similar character to those passed upon in said opinion; and the Court being now of opinion that perhaps the inclusion of said language was improvident as perhaps being inconsistent with the statutory scheme established for dealing with and remedying such grievances or violations, but the Court being of opinion that in any event the action which plaintiff now seeks would not fall within the terms of such language; and the Court further being of opinion that in the election of October 12, 1965, with respect to which plaintiff is now seeking relief, the regulations condemned by this Court's opinion of August 26, 1965, have not been demonstrated to have affected in any respect the outcome of the election, and

that indeed such regulations did not come into play at all as there was nothing upon which they could operate, and that no candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations (see par. 9 of affidavit of Frank M. Kleiler, submitted in support of plaintiff's motion); and the Court being satisfied by the statements and assurances of defendants' counsel at the hearing of May 26, 1966, that defendants in good faith and with due diligence are taking appropriate steps with all convenient speed to reform and amend the regulations governing elections so as to bring them into conformity with the views expressed in this Court's opinion of August 26, 1965; and the Court being of opinion that the period between August 26, 1965, the date of this Court's opinion, and October 12, 1965, the date of the subsequent election with respect to which plaintiff now seeks relief, was not sufficient time in which to effect in due course the reforms required in order to bring about conformity with the views expressed in this Court's said opinion of August 26, 1965; and the Court further being of opinion that before disrupting the existing election procedure, or the results thereof, as plaintiff now seeks, because of want of conformity unto the views expressed in this Court's said opinion of August 26, 1965, defendants are entitled to await the outcome of the appeal now pending from this Court's judgment embodying said views, in order to be assured that said views are sound and acceptable legal doctrine and that the steps being taken by defendants to effect conformity therewith will not prove to have been a vain, transitory, needless and unfruitful burden,

IT IS ORDERED that the relief prayed for in said motion be and the same hereby is denied.

(S) DUMBAULD,
United States District Judge.

APPENDIX E

United States Court of Appeals for the Second Circuit

Nos. 337 and 338—September Term, 1965.

(Argued May 11, 1966 Decided August 1, 1966)
Docket Nos. 29998 and 30085

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT
v.

LOCAL UNIONS 410, 410A, 410B, & 410C, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEFENDANT-RESPONDENT

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT
v.

LOCAL 30, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEFENDANT-RESPONDENT

Before LUMBARD, *Chief Judge*; WATERMAN and KAUFMAN, *Circuit Judges*.

Appeals from judgments of the United States District Court for the Northern District of New York, Edmund Port, *J.*, and the United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, dismissing suits brought by the Secretary of Labor alleging violations of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), for failing to prove the alleged violations may have affected the outcome of the union elections.

hoon v. Harvey *supra*, we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot.

II

When an appeal becomes moot because of circumstances occurring after the decision of the district court, the appellate court may dismiss the appeal, or it may vacate the judgment of the district court with instructions that the complaint be dismissed as moot. See *Cover v. Schwartz*, 133 F. 2d 541, 546 (2 Cir. 1942), cert. denied, 319 U.S. 748 (1943). Upon this decision may turn the future *res judicata* effects of the district court's judgment. See *United States v. Munsingwear*, 340 U.S. 36 (1950). In order to determine the correct disposition and because the adverse nature of the decisions on the merits by the district courts may serve to deter similar suits, we proceed to consider the merits. That examination persuades us that the judgments below should be vacated.

In the Local 30 case, the evidence established that the candidacy of William Neville, a union member for 18 years and an unsuccessful candidate for office in 1958 and 1960, was rejected on the ground that he had not filed a timely declaration of candidacy. In the 1962 election that followed, only the incumbent officers appeared on the ballot. Only 607 of the union's 3,000 members voted, roughly one-half the number that had voted in the contested elections of 1958 and 1960.

In the Local 410 case, eleven members who had filed timely declarations of candidacy were declared ineligible for office because they failed to meet the continuous good standing rule. One of these eleven was a proven vote-getter who had been elected conductor and trustee in 1958 but was not an incumbent in 1962. Only incumbents and their close associates qualified for nomination and election in 1962, and only 216 out

of almost 600 union members voted in the uncontested election.

Nevertheless, both district courts held that the Secretary failed to prove that the exclusion of these members from the ballots "may have affected the outcome" of the election, § 482(c)(2), because there was no indication that persons other than those actually elected might have prevailed had the alleged violations of § 481(e) not occurred. We think that this is too restrictive a view of the burden Congress intended through § 482(c)(2) to place upon the Secretary in Title IV suits to upset union elections.

Early drafts of the LMRDA would have required proof that a violation of Title IV "affected the outcome of the election." The Senate altered this provision by adding the words "may have" with the express intent of reducing the Secretary's burden and thus of facilitating enforcement of Title IV.³ We think this intent and the natural meaning of the proviso are served if the Secretary is required only to prove the existence of a reasonable probability that the election may have been "affected" by an alleged violation of § 481(e).

The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the

³ See Senator Goldwater's remarks upon the change. "The Kennedy-Ervin bill * * * as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless." Legislative History of the Labor Management Reporting & Disclosure Act of 1959, at 1851 (U.S. Government Printing Office, 1959). See also the House Conference Report on H.R. No. 1147 and S. 1555, *id.* at 939.

Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8-1 margin, the proviso should prevent upsetting the election. Compare *Wirtz v. Local 11, International Hod Carriers*, 211 F. Supp. 408 (W.D. Pa. 1962). But in the cases at bar, the alleged violations caused the exclusion of willing candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here.

In holding that § 482(c)(2) had not been satisfied, the district courts relied on a dictum in the concurring opinion of Mr. Justice Stewart in *Calhoon v. Harvey*, 379 U.S. at 146 n. 7, to the effect that relief may only be had in Title IV suits when the complaining insurgent faction "approaches majority status." This would surely be true in the ballot tampering example outlined above. But to apply this standard in exclusion of candidate cases would require reliance on relatively inconclusive factors such as the excluded candidate's performance in previous years. In these cases, there was evidence that the excluded candidates were politically active union members one of whom had stood for and even won office in earlier years. In addition, the elections here complained of were uncontested, and only a small minority of the union electorate actually voted. Under these circumstances, we think the § 482(c)(2) proviso was satisfied. In

order not to leave in effect the lower courts' contrary conclusions, we vacate the judgments of the district courts with instructions that the complaints be dismissed.

III

In our opinion, it is unfortunate that these appeals are moot, for they reflect the need for appellate review in Title IV cases. The IUOE provisions in question and other IUOE candidacy requirements have been the subject of repeated attacks by the Secretary, and the district court decisions have been divided. See *Wirtz v. Local Union 825, IUOE, Civ. No. 438-63* (D.N.J. 1966) (violation assumed—probable effect on outcome not proved); *Wirtz v. Local Union No. 406, IUOE, Civ. No. 14573* (E.D. La. 1966) (violations found—no exhaustion of union remedies); *Wirtz v. Local Union No. 9, IUOE*, 51 CCH Lab. Cas. para 19,579 (D.C. Colo. 1965) (violations found—new election ordered without considering whether effect on outcome proved). Moreover, the eligibility requirements of the IUOE are the most stringent of the 68 major national and international unions, which represent 90 percent of organized labor.⁴ The effect of these requirements is revealed by the fact that only 35 of the 589 members of Local 410 were eligible to stand for office in 1962. Since local elections under these requirements recur every three years, it is important that the Secretary's challenges be finally determined on the merits by an appellate court.

⁴ According to the Department of Labor only two other unions refuse members any grace period in which to pay their dues in order to be in "good standing" and in neither of them must a candidate maintain his good standing for so long as the 12 months required by the IUOE. The IUOE is the only union with the pre-nomination declaration of candidacy requirement.

Title IV itself does not raise significant barriers to appellate review. While the complaining union member must attempt to invoke internal union remedies, he need only wait three months after such invocation before filing his complaint with the Secretary. § 482(a)(2). And while the Secretary must investigate each complaint and make a finding of probable cause of a violation, he is required by § 482(b) to bring a suit challenging the election within 60 days of the filing of a complaint.

As these cases illustrate, it is the delays incident to civil cases in the district courts which create the substantial likelihood that subsequent union elections will moot Title IV cases prior to appellate review.⁵ To prevent recurrence of such delays, we think the district courts should expedite the trial of Title IV cases to the greatest extent possible. In a district, such as the Southern District of New York, it would seem appropriate for such a case to be assigned at an early stage to one judge for all purposes. See Rule 2, Rules of the Southern District Court. In addition, we suggest that in a compelling case, such as one where union elections are held annually, temporary relief may be appropriate to prevent an election from mooting a pending Title IV suit by the Secretary. Of course this court is always ready to expedite such matters, upon application, by ordering an early hearing of the

⁵ In Local 410 the election was held June 4, 1962 and the complaint filed by the Secretary November 26, 1962. The trial did not commence, however, until May 19, 1965. After the district court's decision the new elections were held on August 2, 1965.

In Local 30, the election was held June 12, 1962 and the complaint filed by the Secretary October 8, 1962. The trial began March 25, 1965. After the district court's order of dismissal June 17, 1965, the union held new elections on August 10, 1965.

appeal and shortening the time for docketing the record and filing briefs.

The judgments of the district courts are vacated and the cases remanded with instructions that the complaints be dismissed as moot.

PER CURIAM: The petition for rehearing is denied.

Our opinion in this case and in *Wirtz v. Local Unions Nos. 545, 545-A, 545-B, and 545-C, International Union of Operating Engineers*, decided September 13, 1966, point out the means available to the Secretary to prevent these cases from becoming moot and the means to expedite their disposition, as the Congress intended, so that the rights of individual union members may be suitably protected without unnecessary delay. Thus, if unavoidable or excusable delay prolongs the determination of a suit brought under 29 U.S.C. § 481 to set aside an election, and it appears that another election may be held and new officers installed, before the suit may be determined, the Secretary must make prompt and timely application to the district court to stay such election. This is what the Secretary did in *Wirtz v. Local Unions Nos. 545, et al.*

The district courts should give these matters prompt attention and preferential treatment. In addition, this court stands ready to do whatever may be necessary to expedite the consideration of any such matter which may be ripe for its attention.

APPENDIX F

STATUTES INVOLVED

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, provides in pertinent part:

TITLE IV. ELECTIONS

TERMS OF OFFICE; ELECTION PROCEDURES

* * * * *

SEC. 401. (b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

* * * * *

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind of such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bar-

gaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

* * * * *

ENFORCEMENT

SEC. 402. (a) A member of a labor organization—

- (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body or,
- (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation.

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe

that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election as lawful and practicable, in conformity with under supervision of the Secretary and, so far the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers

of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

APPLICATION OF OTHER LAWS

SEC. 403. No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive.

MAY 2 1967

IN THE

Supreme Court of the United States

October Term, 1967

No. 144557

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION
OF THE UNITED STATES AND CANADA, AFL-CIO.

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

ALBERT K. PLONE,
PLONE, TOMAS, PARKS AND SELMER,

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Camden, New Jersey,
and

STUART SAVAGE,
JUMELINER AND SAVAGE,
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ALBERT K. PLONE
AND
ELEANOR H. KLEIN,
On the Brief.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 1115.

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion and judgment of the District Court are reported at 244 F. Supp. 745 and are found at pp. 19-30 of the Petition. The order of the District Court on Plaintiff's motion for post-judgment relief is unreported and is found at pp. 31-32 of the Petition. The opinion of the Court of Appeals for the Third Circuit is reported at 372 F. 2d 86 (2d Cir. 1966), and is set forth at pp. 33-43 of the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

The question is adequately set forth in the Petition.

STATUTE INVOLVED.

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 401 et seq., are set forth in Appendix F of the Petition.

STATEMENT OF THE FACTS.

After a union member had complained to the Secretary of Labor that he had been disqualified as a candidate for local union office in Respondent Union's election because he had not attended a required number of union meetings, as per the Union's By-laws, the Secretary of Labor instituted an action on March 31, 1964, under Section 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 534, 29 U. S. C. 482 (b). The Secretary alleged that the election held by Respondent Union on October 18, 1963, violated Section 401 (b) and (e) of the 1959 Act. The complaint sought to have: (1) the October, 1963, election declared null and void, and (2) the new election conducted under his supervision.

Prior to trial, it was stipulated, among other things, that although candidates for local union offices were required by the By-laws of Local 153 to attend 75% of the regular monthly meetings, because members of the local union:

- (1) are engaged in a continuously operating industry,
- (2) work rotating shifts in most instances, and
- (3) are consequently precluded from attending a substantial number of meetings,

a member was credited with having attended any meeting held while the member was at work if such member duly notified the local union secretary that such member was at work at the time of such meeting (R. 35a).¹ Therefore, as applied to 93.8% of the members of this local union, a member need only attend approximately 50% of the regular meetings in order to be eligible for nomination for a union

¹ "R" refers to the Union's Brief and the Secretary's Brief in the court of appeals. The page number followed by the letter "a" indicates that the material referred to will be found in the Appendix to the Secretary's brief, whereas, the letter "b" indicates that the material referred to will be found in the Union's brief.

office. The District Court, after a trial without a jury, ruled that although the 75% attendance requirement imposed by the By-laws is an unreasonable qualification within the meaning of Section 401 (e) because of the limited "excuse" area, since there had been no showing that this violation of Section 401 (e) "may have affected the outcome of" the 1963 election—a requirement which Section 402 (c) expressly makes prerequisite to a judicial granting of relief—the District Court would not order a new election. In addition, the District Court noted that: (1) a new election was to be held within two months, and (2) the evidence clearly indicated that the complaining union member, although himself an officer and aware of the attendance requirement, had "voluntarily absented himself from meetings on occasions not justified by sickness, or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-laws, but to his own voluntary unwillingness to comply therewith" (R. 16a-17a). The Secretary appealed from the judgment of dismissal.

Seven weeks after Judge Dumbauld's ruling, the Union conducted its regular general election of officers. Since, in the period between August 26, 1965, the date of Judge Dumbauld's decision, and October 12, 1965, the date of the subsequent election, there was not sufficient time in which to effect a change in the Union's By-laws re the rule regarding "excuses", the 1965 election was conducted under the then existing By-laws. However, no candidate who sought union office was "disqualified from being a candidate by reason of the application of said regulations" (R. 20a).

Pursuant to the order of remand of the Court of Appeals for the Third Circuit, Plaintiff filed a motion for post-judgment relief in the district court. He sought a declaration that Respondent's October 12, 1965, election was invalid, and a court order requiring the holding of a new

election under the Secretary's supervision. This motion was made despite the fact that no office seeker or union member had filed a complaint about the conduct of the 1965 election.

Finding "that no candidate or candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations" (R. 20a), the District Court refused to declare the October, 1965, election invalid and refused to order a new election. The Secretary also appealed from the order denying the post-judgment motion for relief.

On review, the Court of Appeals for the Third Circuit held that "the 1965 election of officers, as disclosed in the [Secretary's] post-judgment motion, made the original action challenging the 1963 election moot," (Brief for Petitioner, pp. 14-15), and that the "challenge to the 1965 election must fail because no member of the union ha[d] filed with the Secretary a complaint seeking to invalidate that election" (Brief for Petitioner, p. 15).

ARGUMENT.

In three separate actions against three separate unions the Secretary of Labor was denied the relief he sought—i.e., the invalidation of a union election and the concomitant right to run a supervised election if the union elections under attack were declared null and void.²

² In *Wirtz v. Local Union No. 125, Laborers' Int'l Union* (on petition for a writ of certiorari, No. 1117), the Secretary sought invalidation of the earlier election as well as the challenged run-off election, so that he could conduct a new general election which pertained to all union offices. The district court confined the relief sought by the Secretary to that office encompassed by the run-off election, i.e., the office of Business Representative.

While the Secretary's appeal from the district court's decision was pending in each case, the Union conducted its regularly scheduled election. Nevertheless, the Secretary continued in his endeavor to have each attacked election declared invalid, so that he might conduct a supervised new election.

In the case now before the Court, the Secretary, himself, recognized that he, in effect, was seeking relief of an illusory nature. E.g., in his brief to the Third Circuit, in the instant case, the Secretary conceded that the "... holding of the 1965 election, has, of course, removed from the case any immediate need for declaring the 1963 election void, since the terms of office for which that election was held have expired" (Brief for Appellant, p. 17).

I.

**There is no conflict among the Circuit Courts of Appeals—
three have determined that the issue raised by the
Secretary of Labor is "moot."**

At the time the Court of Appeals for the Third Circuit determined that the issue raised on appeal, i.e., the invalidation of the 1963 election was moot, because subsequent to the district court's judgment³ a regularly scheduled union election had been conducted, the Court of Appeals for the Second Circuit, in a consolidated action involving the invalidation of two union elections, had already dismissed the issues raised in *Wirtz v. Local Union No. 410, et al.*, and *Wirtz v. Local Union No. 30*, 366 F. 2d 438 (2d Cir. 1966), by the Secretary for the same reason—mootness. Subsequently, the Court of Appeals for the Sixth Circuit, in

³ The district court had not found it necessary to order a supervised election.

Wirtz v. Local Union No. 125, Laborers' Int'l Union, — F. 2d — (6th Cir. 1966),⁴ dismissed the Secretary's appeal as to the scope of the district court's order as moot—while the appeal was pending, the union had conducted its regular election, and, in compliance with the district court's order, a supervised election for the office of Business Representative. In the *Local 125* action, the Secretary had sought a court order which would have permitted him to conduct a supervised election of all of the union's offices. The district court, however, had restricted the Secretary's supervision of the election to the office of Business Representative,—the office encompassed by the complaint.

In *St. Pierre v. U. S.*, 319 U. S. 41, 42 (1943), the Supreme Court had held that:

“The Federal Court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.”

See also, *U. S. v. Alaska S. S. Co.*, 253 U. S. 113 (1920), and *California v. San Pablo & Tulare Railroad Co.*, 149 U. S. 308 (1893). Consequently, when the attention of three courts of appeals was focused on the relief desired by the Secretary and when each court recognized that it would be performing a vain act if it were to invalidate an election which had already been superseded by a subsequent election, the courts were in agreement that the cases must be dismissed as “moot”. Since no other court of appeals has held to the contrary, there is no conflict among the courts of appeals on this issue and the Secretary does not contend that there is.

⁴ This case is reported unofficially at 55 L. C. ¶11,781, and may be found at pp. 9-10 of the petition for a writ of certiorari, No. 1117, filed in that case on March 3, 1967.

II.

The decision of the Court of Appeals is clearly correct.

In arriving at the conclusion that the Secretary's action was moot, the Court of Appeals for the Third Circuit concurred in the reasoning of the Court of Appeals for the Second Circuit in *Wirtz v. Local Union No. 410, et al.*, and *Wirtz v. Local Union No. 30*, 366 F. 2d 438 (2d Cir. 1966), wherein the court had determined that:

"It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, . . . we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot." 336 F. 2d at 442.

In his petition, the Secretary contends that the respective courts of appeals have committed the same fundamental error in reading the statute, in that they have not recognized that the statute confers two remedial powers upon the Secretary:

- (1) authority to set aside the invalid election, and
- (2) authority to direct the conduct of an election under the Secretary's supervision.

As to the first power conferred upon the Secretary, the unanimity of agreement among the courts of appeals that the issue is moot arises from the fact that there no longer is an "invalid" election to set aside. And, as for the argument that the Secretary is entitled to supervise the union's

subsequent election even if the terms of the officers elected in the invalid election have expired—in furtherance of the remedial provisions of Title IV which were designed to protect the public interest in democratic labor unions,—the Petitioner candidly conceded at the pre-trial conference in the instant case that “there is no claim that there is any particular evil resulting from this election,” nor “a corrupt and untrustworthy clique” which has succeeded in establishing itself in office (R. 5b-6b). Furthermore, it is clear that the right to conduct a supervised election is predicated upon the proposition that there are invalidly elected officers in control of the union at the time a new election is ordered. Otherwise, an anomalous situation is created if the Secretary is allowed to conduct a supervised election subsequent to the holding of a validly conducted and unchallenged election, in that validly elected union officials may be denied their right to hold office. In addition, since a presumption of validity attaches to all union elections, a presumption which is only rebuttable if a union member complies with the statutory procedure set forth for the invalidation of a union election in Section 402, the invalidation of an uncomplained about election would be beyond the jurisdiction of the Court.

This conclusion is compelled by the express language of the statute, and an analysis of the legislative history of the pertinent provisions of the Act. Under Title IV, the power of the courts with respect to union elections is hedged about with procedural safeguards. Section 402, 29 U. S. C. Section 482 (Supp. IV 1959-62) provided that review in the courts of union election irregularities may be had only when:

- (a) a complaining member (1) has exhausted his remedies within the organization or has failed to get a final decision within three months after invoking his internal remedies, and (2) has filed a

complaint with the Secretary of Labor within one calendar month thereafter; and

(b) the Secretary has (1) investigated the complaint, (2) found probable cause to believe that a violation has occurred and has not been remedied, and (3) has brought an action to set aside the election.

Pending a final determination, the election is to be presumed valid, and the affairs of the organization are to be conducted by the elected officers. *Robins v. Rarback*, 325 F. 2d 929, 930 (2nd Cir. 1963), cert. denied 379 U. S. 974 (1965).

The adoption of these elaborate protections against unjustifiable interference with internal union processes, at a time when there was great agitation for legislative control in the labor-management area, was the result of congressional recognition that there was also a concomitant need for restraint in regulating the internal affairs of unions. *Calhoon v. Harvey*, 379 U. S. 134, 140 (1964). Even Professor Archibald Cox, the commentator who had made one of the most articulate pleas for legislative control in this area, and who had urged most strongly the passage of the Labor-Management Reporting and Disclosure Act, so as to preserve democracy within unions and to guarantee to every union member the right to make his voice heard in the formulation of union policy, viewed the exhaustion of internal remedies as a necessary part of the proposed legislation. Consequently, he specifically rejected one form of proposed legislation, then pending, which gave the government wide powers to regulate the internal affairs of unions. In his article, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609 (1959), Cox said:

"The fundamental objection is that it would have turned over to an arm of the federal government the responsibility of carrying on the internal governmental processes of a labor union without any showing that

the union officers and members were incompetent and corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."

Commenting upon the problem of union elections, Professor Cox stated:

"Requiring the exhaustion of internal remedies would preserve a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections . . ." Id. at p. 633.

Despite this background and the fact that the express language of Section 402 (c) requires the court, where there is a violation to declare the *complained about* election void, the Secretary seeks to change the plain meaning of Section 402 (c) (2) by judicial fiat,—so that the language will be interpreted as meaning "any election" rather than "the election".

The courts of appeals, which were faced with the Secretary's attempt to use one complaint to bootstrap himself into a position where he, in effect, would control all subsequent elections of a particular union, recognized that the sanctioning of such activity by the Secretary would be in contravention of the law of Congress. Had it been the intention of Congress to encompass all subsequent elections, it could have and would have so provided. Consequently, the respective courts of appeals rejected the Secretary's contention that the right to investigate and correct by suit one union election gave him carte blanche authority to reach in and seek to control the conduct of the union's subsequent elections.

III.

If the procedural requirements of the Act create a problem in the administration of the Act, the Secretary must appeal to the legislature for a remedy.

The Secretary has contended that if these actions are dismissed as moot, frequently scheduled union elections and the procedural requirements of Title IV raise significant barriers to appellate review.⁵ However, upon analysis of the statutory scheme, it is evident that while a complaining union member must attempt to invoke internal union remedies, he need only wait three months after such invocation before filing his complaint with the Secretary (Section 402 [a] [2]). It is also evident that, while the Secretary must investigate each complaint and make a finding of probable cause of a violation, the Secretary is required by Section 402 (b) to bring a suit challenging the election within 60 days of the filing of a complaint. As the Second Circuit pointed out in *Wirtz v. Local Union No. 410, et al.*, and *Wirtz v. Local Union No. 30*, 366 F. 2d 438 (2d Cir. 1966), "it is the delays incident to civil cases in district courts which create a substantial likelihood that subsequent union elections will moot Title IV cases prior to appellate review", rather than the design of union officials.

If a proper interpretation of the relevant statutory provisions demands a result which does, in fact, frustrate the objectives of the statutory provisions enacted by Congress in 1959, then the Secretary must appeal to the legislature for such legislative enactments as will, in his judgment, remedy the problems he encounters. Resort to this Court, by way of a petition for certiorari, whenever the Secretary is dissatisfied with the results that explicit legislation com-

⁵ Brief for Appellant, p. 15.

pels, is not the proper avenue for amending the laws of Congress, and a petition for a writ of certiorari which, in effect, seeks to do just that, should be denied. When the Secretary seeks to act in a sphere which has not been assigned to him, i.e., where Congress has delegated no authority to him to challenge a presumptively valid election, in the absence of the filing of a complaint by a "member of a labor organization", his action is ultra vires, and he has no statutory right to invoke the judicial process to attack *any* union election.

CONCLUSION.

It is well-recognized that the grant or denial of a writ of certiorari lies within the sound discretion of the judiciary. Unlike an appeal as of right, review by way of certiorari should be granted only where there are special or important reasons, e.g.

- (1) where a court of appeals has rendered a decision which is in conflict with the decision of another court of appeals on the same matter of federal law,
- (2) where a court of appeals has decided a federal question in such a way that it conflicts with applicable decisions of this Court, or
- (3) where a court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

But where, as here, three separate courts of appeals have recognized that federal law precludes them from performing a vain act, and where, as here, three separate courts of appeals have arrived at a determination of "mootness" which is compelled by the plain meaning of the statute,

thereby evidencing an absence of conflict among the circuits, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1, 1967.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 57

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER
v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF
THE UNITED STATES AND CANADA, AFL-CIO

No. 58

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER
v.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF
APPEALS FOR THE THIRD AND SIXTH CIRCUITS*

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

In No. 57, the opinion of the court of appeals (57 R. 65) is reported at 372 F. 2d 86, and the opinion and judgment of the district court (57 R. 38) is reported at 244 F. Supp. 745. The order of the district court on the Secretary's motion for post-judgment relief (57 R. 55) is unreported.

In No. 58, the order of the court of appeals (58 R. 112) is reported at 375 F. 2d 921; the opinion of the

district court striking portions of the complaint (58 R. 5) is reported at 231 F. Supp. 590; and the opinion of the district court on the Secretary's motion for summary judgment (58 R. 92) is unreported.

JURISDICTION

In No. 57 the judgment of the court of appeals (57 R. 70) was entered on December 16, 1966. In No. 58, the judgment of the court of appeals (58 R. 112) was entered on December 15, 1966. The petitions for writs of certiorari were filed on March 3, 1967, and granted on May 15, 1967 (57 R. 72; 58 R. 114). We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Title IV of the Labor-Management Reporting and Disclosure Act of 1959 establishes standards for union elections. The Secretary of Labor, upon the complaint of a union member who has failed to obtain within three months redress through the internal processes of the union, is authorized to bring suit. If the court finds that a violation of the Act has occurred which may have affected the outcome of an election, it is directed to declare the election void and to order a new election under the Secretary's supervision. We present the following questions relating to this statutory scheme:

1. Whether the Secretary's suit is mooted if, during its pendency, the union holds another election.
2. Whether the Secretary may challenge only the precise violations specified in the member's complaint to the union (No. 58).

3. Whether an unreasonable candidacy qualification may have affected the election's outcome when it rendered more than 97 percent of the union membership ineligible for elective office, including a member who had actually been nominated (No. 57).

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, are printed in the Appendix, *infra*, pp. 55-62.

STATEMENT

1. No. 57.—The Secretary of Labor, on March 31, 1964, filed suit asking the district court to set aside an election which had been conducted by the defendant union on October 18, 1963, and to direct the holding of a new election, to be supervised by the Secretary. The action was instituted pursuant to Section 402 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 482), which authorizes the Secretary of Labor to bring suit in respect of a violation of Section 401 of the Act after receiving a complaint from a union member who has exhausted his internal union remedies, and directs the district court to grant the relief prayed for if it finds that such a violation may have affected the outcome of an election. The complaint alleged that the union had violated Section 401(e) of the Act, which provides that in an election subject to the Act every member of a labor organization shall "be eligible to be a candidate and to hold office (subject to * * * reasonable qualifications uniformly imposed) * * *."

It was stipulated that respondent, Local 153, is a

local labor organization chartered by, and subordinate to, the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, is engaged in an industry affecting commerce as defined by the Act, and is therefore subject to the requirements of Title IV; that the International Constitution and the local's by-laws require all candidates for local union office to have attended 75 percent of the monthly union meetings in the two years prior to the election; that members were not excused on account of illness but only if they were required to be at work when the union meetings were held; and that excuses had to be submitted in writing to the union's secretary within 72 hours of the missed meeting (57 R. 10-13). As a consequence of these requirements, it was stipulated, only 11 members of the 500-member union were eligible to run for office in 1963 (57 R. 12). In the election the Vice-President and Financial Secretary ran for re-election unopposed (57 R. 17) and there were no candidates at all for Recording Secretary and for three Trustee positions; these positions were filled by the appointment of members who could not have qualified as candidates under the meeting-attendance requirement (57 R. 12).

This action was instituted after the Secretary had received and investigated a complaint from a union member, a nominee for the office of president of the local, who was disqualified as a candidate because he had attended only 17 of the 24 relevant monthly meetings (57 R. 13). The minutes of one of the seven meetings which he missed indicated that he had been hospitalized on the occasion of that meeting (57 R.

13). The union had failed to act on the member's internal complaint (57 R. 11-12).

The district court held that the 75-percent attendance requirement violated the "reasonable qualifications" provision of Section 401(e) because 75 percent was too high a percentage, the provision governing excuses was too limited and the effect of the rule too restrictive (57 R. 44-46). Notwithstanding this conclusion, the court denied the relief requested by the Secretary on the ground that the plaintiff had failed to establish that the violation "may have affected the outcome" of the election, as required by Section 402 (c)(2), because there was evidence that the complaining member "voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-Laws but to his own voluntary unwillingness to comply therewith" (57 R. 47). It therefore dismissed the complaint, although it "retain[ed] jurisdiction" for further action "in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union" (57 R. 48). The Secretary appealed from the judgment of dismissal.

The union's next regular election was held in October 1965, and on the Secretary's motion the court of appeals remanded the case to the district court to take evidence concerning that election (57 R. 49). The

The Secretary later moved for summary judgment with respect to the remaining allegations of the complaint. The court, finding that at least 58 of the 379 members who voted in the run-off election of July 13, 1963, and two of the three candidates in that run-off election, had been ineligible under the union's constitution, granted the Secretary's motion and directed the conduct of a new election for the office of Business Representative under the Secretary's supervision (58 R. 107). Referring to its earlier ruling dismissing parts of the Secretary's complaint, the court found it unnecessary to decide whether the Secretary was entitled to challenge the run-off election on the basis of the ineligibility of two of the three candidates. Because of the imminence of respondent's next regular election, the court directed that the regular election for the office of Business Representative be held under the supervision of the Secretary and the successful candidate installed in office for a full constitutional term (58 R. 110).

The Secretary appealed from the order limiting relief to the office of Business Representative. On June 11, 1966, less than two months after the district court had rendered judgment, the union held its next regular election and, at the same time, a supervised election for the office of Business Representative pursuant to the court's order. The court of appeals, without reaching any other issues, thereupon dismissed the Secretary's appeal as moot, relying on the decision of the Court of Appeals for the Second Circuit in *Wirtz v. Local Unions* 410, 410A, 410B &

410C, *International Union of Operating Engineers*,
supra.

SUMMARY OF ARGUMENT

Title IV of the Labor-Management Reporting and Disclosure Act of 1959 establishes certain standards for the conduct of union elections. The procedure for redressing violations of these requirements is as follows. First, a union member must complain to the union of an electoral violation. Should the union fail to make voluntary correction, the Secretary of Labor may bring an action in a federal district court. The court shall declare the election challenged by the Secretary void, and direct the holding of a new election under the Secretary's supervision, if it finds that a violation of Title IV occurred which may have affected the outcome of the election.

I

In each of the two cases at bar, the union held its next regularly scheduled election while the Secretary's appeal from an adverse decision of the district court was pending, whereupon the court of appeals dismissed the case as moot because, in its view, the Secretary was no longer entitled to an order directing a new election under his supervision. However, the provision requiring a supervised election upon finding a violation that may have affected the outcome of the challenged election is unqualified; the statute does not say, "unless the union has already held its next election," although it could have been anticipated that a second election would frequently overtake the Secretary's suit. Moreover, to imply such a limitation on

Secretary submitted an affidavit stating that the 75-percent attendance requirement had remained in effect during the 1965 election; that in consequence only 2.6 percent of the membership had been eligible to run for office; that only eight candidates ran for the eight union offices, with only one running for president and no candidates being nominated for three of the offices; that no members were nominated who were ineligible under the 75-percent rule; and that the rule was not waived on behalf of any nominee (57 R. 52-54). The district court denied the Secretary's motion to have the 1965 election declared invalid (57 R. 55).

On appeal by the Secretary, the court of appeals held that the Secretary's challenge to the 1963 election had been mooted by the 1965 election. The court relied on the decision of the Court of Appeals for the Second Circuit in *Wirtz v. Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers*, 366 F. 2d 438, and in particular on the following reasoning of the Second Circuit (366 F. 2d at 442):

The exclusive remedy which Congress had created for challenging a union election, see 29 U.S.C. § 483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election. * * *

* * * It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare

a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election * * * we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot.

The court found it unnecessary to decide whether the trial court had been correct in ruling that the imposition of the unreasonable meeting-attendance qualification could not have affected the outcome of the 1963 election, but stated that it would not permit the decision to stand as a precedent on this contested issue and, therefore, directed that both the judgment and the post-judgment order be vacated (57 R. 69).

2. No. 58.—Respondent, a local union engaged in an industry affecting commerce as defined by the Labor-Management Reporting and Disclosure Act and therefore subject to the requirements of Title IV, held a general election of officers on June 8, 1963. The vote for the office of Business Representative was a tie. A run-off election for that post was held on July 13, 1963 (58 R. 92). Within one month after the run-off, the losing candidate in the run-off protested its conduct to the union, on the ground that members not in good standing had been permitted to vote, in violation of Section 401(e). He then filed a complaint with the Secretary of Labor repeating his protest (58 R. 92).

Respondent is governed by the Constitution and the Uniform Local Union Constitution of the Laborers' International Union of North America. Under the Uniform Local Union Constitution, membership dues

are payable on the first day of each month; unless they are paid on or before the last day of the following month, good standing is lost, and the member is automatically suspended without notice and with loss of all membership rights except the right to readmission upon payment of a fee (58 R. 87, 95). Readmitted members are considered new members from the date of readmission (*ibid.*). Candidates for office are required to have maintained continuous membership in good standing for a period of two years in the International and at least one year in the Local (58 R. 34, 107). Since any member whose dues are in arrears for more than two months is automatically suspended, such arrearage occurring within two years before the election makes a member ineligible to be a candidate.

The International Constitution requires respondent to remit to the International a per capita tax payment of \$1.00 per member each month (58 R. 30, 96). These payments are to be made only for members who have in fact made current payment of their dues to the Local (58 R. 39, 98). However, during the calendar year 1962 and until July 1963, respondent's Secretary-Treasurer at times remitted per capita tax payments to the International from the general fund of the Local in behalf of individual members who had not made timely payment of their dues (58 R. 96-98). As a result, some 50 to 75 members appeared to be in good standing, on the basis of the per capita tax reports, although they had actually lost their good standing (58 R. 63, 96). During the same period, some 700 members who had fallen into arrears

in the payment of their dues were automatically suspended with loss of good standing in accordance with the Constitution (58 R. 101). The Secretary's investigation disclosed that 16 of the 27 candidates for office in the June 8, 1963, election, including several victorious candidates (among them the eventual winner of the run-off election) should have been ruled ineligible under the foregoing provisions and that approximately 50 of the members voting in the June 8, 1963, election, and approximately 60 members voting in the July 13 run-off election, should have been declared ineligible (58 R. 75-76).

By a letter dated January 27, 1964, the International and respondent Local were advised of these findings. (58 R. 68). A conference between attorneys representing the Secretary and attorneys representing the International was held on February 4, 1964, to discuss the investigative findings (58 R. 75-76). When the representatives of the International declined to take any corrective action, the Secretary, on February 7, 1964, brought suit to declare both the general and run-off elections invalid and to direct a new election of officers under his supervision. The complaint alleged that the union had violated the Act by permitting ineligible members to vote and to run for office at both the general and run-off elections in 1963 (58 R. 3).

On the union's motion, the district court struck those portions of the complaint directed to the election of officers other than Business Representative because no complaint by a union member had challenged the general election of June 1963 (58 R. 15).

the scope of the relief available to the Secretary would defeat the basic policy of Title IV.

Briefly, that policy is to foster union democracy and representative union leadership. These goals would be thwarted if the holding of an unsupervised election terminated judicial power to order a supervised election. In the first place, there is no assurance that the union in the second election will abandon the violation that gave rise to the Secretary's challenge to the first. Where it does not—as happened in one of the cases at bar, No. 57—the result is that the violation will go entirely uncorrected unless a supervised election is ordered, since Congress gave the courts no power to enjoin violations of Title IV. In the second place, incumbent officers enjoy inherent advantages in obtaining re-election in an unsupervised election because they control the electoral machinery. Thus, if they were unlawfully elected, a supervised election (the procedures for which are specifically designed to minimize the advantages of the incumbents) is necessary in order to assure that the effects of the illegality do not persist.

To be sure, the result will sometimes be the nullification of an election that was not itself unlawful. But it is not uncommon for a judicial remedy to outlaw some lawful as well as unlawful acts where necessary to ensure complete and effective relief against a proven illegality. This result is far preferable to either enjoining the holding of another election pending the Secretary's suit attacking the first—which serves only to perpetuate the unlawfully elected incumbents in office beyond the expiration of their

term—or expediting the Secretary's suit—a device that will often be ineffective, due to the frequency of union elections, and sometimes positively harmful in its impact on the statutory policy and procedures of voluntary settlement of electoral violations.

II

In No. 58, the district court held that the Secretary of Labor could not challenge a general election for all officers because the complaining union member had specifically challenged only the conduct of the run-off election for the one office as to which the general election resulted in a tie vote. We believe that the Secretary was entitled to broaden the scope of the suit as he did. The Secretary's allegations were fairly within the scope of the internal complaint, which, limited as it was, placed the union on clear notice of the violations that had occurred at the general election. For any reasonably careful investigation of the run-off would have revealed that the same violation had occurred at the general election and had extended to all of the offices at stake.

Beyond this, we submit that the Secretary is entitled to challenge any violations that he has uncovered in the course of his investigation of the union member's complaint. The statutory language imposes no restriction on the scope of the complaint (save that it must relate to the election challenged by the complaining member, and for this purpose it seems plain that the run-off and the general election which preceded it should be viewed as a single election). The statutory goal of representative union leadership would be

undermined if the Secretary could not proceed against violations that his investigation of the internal complaint revealed merely because they were concealed from, or overlooked by, the complainant. Nor is the policy underlying the internal-complaint-and-exhaustion requirement—to afford the union an opportunity to correct any electoral violations voluntarily before the Secretary brings suit—offended by the principle we urge, since the Secretary notifies the union, in advance of suit, of any violation he discovers in the course of his investigation (whether or not they were alleged in the internal complaint), thus affording full opportunity for voluntary correction.

III

The district court in No. 57 held that a requirement that union members to be eligible to stand for office have attended 75 percent of the union's monthly meetings in the two years preceding the election was unreasonable and hence unlawful under Title IV, but refused to find that it "may have affected the outcome" of the election—the necessary predicate for relief. This was error. The purpose of requiring a showing that the violation may have affected the outcome of the election is to excuse trivial violations; but that, plainly, is not our situation. Here the unlawful practice resulted in disqualifying 97 percent of the union's membership from running in the union's elections. Nor can it be said that none of those wrongfully disqualified might have stood for office and won—thus affecting the outcome—especially when one of the disqualified members was an avowed candidate for a specific union office.

ARGUMENT

I. IN BOTH CASES, THE COURTS OF APPEALS ERRED IN HOLDING THAT AN ACTION BY THE SECRETARY OF LABOR TO DECLARE AN ELECTION VOID AND TO DIRECT A NEW ELECTION UNDER HIS SUPERVISION WAS MOOTED BY THE INTERVENTION OF THE UNION'S NEXT REGULARLY SCHEDULED ELECTION.

Section 401 of the Labor-Management Reporting and Disclosure Act of 1959 declares unlawful certain abuses in union elections, such as imposing unreasonable candidacy requirements, and Section 402 empowers the Secretary of Labor, upon complaint by a union member after he has exhausted his internal union remedies, to bring an action in federal district court to redress such violations. The latter provision stipulates ~~that~~ if the court finds that a violation occurred which "may have affected the outcome of an election," it "shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary * * *." In each of the cases at bar, the Secretary brought a suit under this provision challenging a union election and while his suit was pending on appeal the union held its next election. Both courts of appeals dismissed the appeals as moot by reason of the new election. The principal question presented is the correctness of this disposition.

A case becomes moot when the relief sought becomes futile, impossible or academic. *E.g., California v. San Pablo & Tulare R.R.*, 149 U.S. 308. Thus, a suit to replevy a specific article would be moot if, prior to judgment, the article was returned to the

plaintiff, or destroyed. These suits by the Secretary of Labor are moot if, by reason of the intervening elections, he is no longer entitled to orders directing new elections under his supervision even if he establishes that the previous elections are void.

The language of the Labor-Management Reporting and Disclosure Act lends no support to the view of the courts below that the intervening elections cut off the Secretary's right to the relief asked. The Secretary is entitled to such relief, under Section 402, when a violation has occurred "which may have affected the outcome of an election," and there is no provision equating "an election" with "the immediately preceding election." No such gloss was suggested in the debates preceding enactment. Nor is that result indicated to us when we look to the general purposes and overall design of the Act.

To be sure, if the Act were concerned to protect only the private right of a union member to run for a particular union office in a particular election, there might be some merit to the argument that, once the term of office to which the candidate aspired has been terminated by the election of new officers, he is no longer entitled to complain about the old election. But even the courts below did not adopt so narrow a view of the purposes of the Act. They conceded the Secretary's interest in the electoral process beyond the immediate term of office in issue by endorsing the Second Circuit's suggestion that the Secretary, to prevent his suit from becoming moot, may ask to enjoin the holding of a new election and thus to perpetuate the incumbents in office beyond their

prescribed term.¹ As we show presently (*infra*, pp. 17-19), the Act is intended to do more than protect a candidate's right to run in a particular election: the objective is to ensure a democratic electoral process. And that purpose, as we shall demonstrate (*infra*, pp. 19-38), requires that the courts be free to order a new election, supervised by the Secretary, notwithstanding that the union has held another election in the interim.

A. THE POLICY OF TITLE IV IS TO ENSURE FAIR AND DEMOCRATIC UNION ELECTIONS

The policy underlying Title IV is stated at the outset of the Act (29 U.S.C. 401):

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to * * * choose their own representatives.

Thus, although some of the bills before Congress would have permitted the complaining union member to sue in his own right (S. 748, 86th Cong., 1st Sess., 105 Cong. Rec. 1276; H.R. 8342, 86th Cong., 1st Sess., 105 Cong. Rec. 15887), the Act as finally passed provided that a suit by the Secretary of Labor was to be the exclusive post-election remedy. 29 U.S.C. 483. So providing, "Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the *public*

¹ See *Wirtz v. Local Unions 410, Etc.*, 366 F. 2d 438; *Wirtz v. Local Unions Nos. 545, Etc.*, 366 F. 2d 435. We explain *infra*, p. 34, why the Second Circuit's suggestion does not provide a suitable means of implementing the Secretary's continuing interest in the union's electoral process.

interest." *Calhoon v. Harvey*, 379 U.S. 134, 140 (emphasis added). The focus is on the right of *all* the union members to be governed by officials who are "responsive to the desires of the men and women whom they represent." S. Rep. No. 187, 86th Cong., 1st Sess., p. 20; H. Rep. No. 741, 86th Cong., 1st Sess., p. 16. Of course, Congress also viewed Title IV as a means whereby losing or disqualified candidates could receive the assistance of the federal government in vindicating their rights (see 104 Cong. Rec. 10947 (remarks of Senator Kennedy)); but this is not the sole office which Title IV performs.

One indication of the broader interest protected is that the Secretary's power to institute a suit under this title does not depend on complaint being made by a losing or disqualified candidate; the only prerequisite to suit is a complaint (after exhaustion of internal union remedies) by "a member" of the union (29 U.S.C. 482(a))—by any member (S. Rep. No. 187, 86th Cong., 1st Sess., p. 13) who feels aggrieved by the electoral result. The complaint-and-exhaustion requirement is designed primarily to preserve "a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections". (S. Rep. No. 187, 86th Cong., 1st Sess., p. 21), with a secondary purpose being to confine the Secretary's intervention to situations in which the electoral abuse is grave enough to move at least one member of the union to complain; and these objectives are completely consistent with the view that the basic purpose of Title IV is to ensure representative union leadership—to protect the

voter—rather than merely to advance the interests of aspirants for union office.

We next show that this purpose would often be thwarted unless the Secretary's right to relief survived a new election.

B. REPRESENTATIVE UNION LEADERSHIP CANNOT BE ASSURED IF THE HOLDING OF A NEW ELECTION BY THE UNION PRECLUDES THE IMPOSITION OF ANY SANCTION FOR A PREVIOUS UNLAWFUL ELECTION

Superficially, it might seem that the adverse effects on union democracy of an election whose outcome might have been affected by a violation of Section 401 would wash out when the union held its next election. In many instances, however, the taint of the original election infects the next and is curable only by the Secretary's "laboratory" election.

The facts of No. 57 illustrate this in striking fashion. On remand, the Secretary proved that at the union's second election in October 1965—the event the court of appeals later held mooted his action—the attendance requirement of the union's bylaws which had given rise to the suit was again used to disqualify candidates, despite the decision of the district court on August 26, 1965, holding this limitation unlawful. As a result of the requirement only 13 of 500 members were eligible to run for office at the 1965 election and only 8 candidates actually ran. Indeed, the union's electoral process was so distorted that there were no candidates at all for the three trustee offices, which the union's bylaws require be filled electively, and it became necessary for the president of the union to appoint the three incumbent trustees (as he had done

after the previous election in 1963) although they were ineligible under the attendance requirement to run for the office.

Thus the taint of the challenged election persisted in the succeeding one; the results of the latter were no more representative than that of the former. The second election made the statutory remedy of a laboratory election no less needful.² And that would be true

² Before the decision of the Court of Appeals for the Second Circuit in *Wirtz v. Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers, supra*, the district courts had generally upheld the Secretary's right to file a supplemental complaint, without any renewal of the initiating procedures of internal protest, complaint to the Secretary, investigation, and finding of probable cause, when the alleged violations giving rise to a pending Title IV suit were repeated in a subsequent election. *Goldberg v. Trico Workers Union*, 53 L.R.R.M. 2875 (W.D.N.Y.); *Wirtz v. Local 559, United Brotherhood of Carpenters and Joiners*, 60 L.R.R.M. 2522 (W.D. Ky.); *Wirtz v. Research, Development and Technical Employees Union* (D. Mass., Civil Action No. 64-567-W, 1965); *Wirtz v. Local Union 825, 825A, 825B & 825C, International Union of Operating Engineers* (D. N.J., Civil Action No. 438-63, 1965); *Wirtz v. Local 84, Glass Bottle Blowers Association* (D. Kansas, Civil Action No. KC-2140, 1966). The procedure followed in these cases was consistent with the decisions of this Court in the closely analogous situation presented in National Labor Relations Board unfair labor practice proceedings. The Board, like the Secretary of Labor under Title IV of our Act, may act only upon receipt of a complaint, or a charge, from an aggrieved party. However, the Board is not precluded from "dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *National Licorice Co. v. Labor Board*, 309 U.S. 350, 369; *Labor Board v. Fant Milling Co.*, 360 U.S. 301, 306-307, 309. Similarly, here, the Secretary and the courts should be free to deal with violations related to those alleged in the complaint which take place during the pendency of the litigation,

even if the union had not actually applied its unlawful condition of candidacy, for there would have been no assurance, without a supervised election, that the union members had been adequately notified of the elimination of the unreasonable attendance requirement.³ Certainly, the continuing need for a laboratory election exists when it is not known whether the violation giving rise to the Secretary's suit persisted into the second election.

Such is the case in No. 58. There is no evidence whether the violation was repeated in the unsupervised portion of the 1966 election.⁴ But, in any event, the remedy of a laboratory election closely supervised and controlled by the Secretary is designed not merely to assure the discontinuance of the particular violation found—an objective that could as well be achieved by empowering the court to enjoin violations (see *infra*, pp. 34-37). Of equal importance, the laboratory election serves—more effectively than alternative devices—to neutralize the inherent advantages of the

³ One of the procedures which the Secretary follows at supervised elections is to hold a pre-election conference, open to the membership, at which ground rules for the election are adopted.

⁴ The Department of Labor advises us that its representatives who supervised the election for Business Representative were not in a position to determine whether ineligible members either ran for office or voted at the election for the other offices. Although the supervised and unsupervised elections took place at the same time and in the same hall, separate ballots and separate ballot boxes were used, and there were two separate lines of voters. Thus, so far as the Department knows, persons ruled ineligible to vote at the supervised election could have voted at the unsupervised election, and persons ineligible to run at the supervised election could have run at the unsupervised election.

unlawfully elected incumbents in perpetuating their office in subsequent elections through control of the electoral machinery, using techniques which are not demonstrably unlawful but which nonetheless favor incumbents. Unless a supervised election is conducted to break this cycle of control a single invalid election may taint several which follow it.

The procedural standards for elections which the 1959 Act and most union constitutions and bylaws establish leave to those administering the elections considerable room for maneuver. To be sure, the Act contains specific provisions for ensuring equality of treatment with respect to mailing of campaign literature; requires "adequate safeguards to insure a fair election" including the right of any candidate to have observers at the polls and at the counting of ballots; and guarantees "reasonable opportunity" for the nomination of candidates, the right to vote without fear of reprisal, and the right of every member in good standing to be a candidate, subject to "reasonable qualifications uniformly imposed." 29 U.S.C. 481 (c), (e). Nevertheless, when the incumbent officers control the details of the election process, they are in a position to make decisions regarding election procedure which favor the incumbent slate yet cannot be shown, in a post-election suit, to have been illegal or, if illegal, to have been sufficiently important to the outcome to justify setting aside the election. As one distinguished student of the subject has remarked (Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1228-1229 (1961)):

The problem of maintaining equality in a contested election is aggravated by the fact that control of the process is commonly in the hands of one of the competing factions. The lack of any established two-party system, in most unions hinders the development of devices for sharing control between the opposing groups. * * *

Normally union officers control the election process. They call and preside at the nomination meeting, rule on the qualifications of candidates, design the ballot, fix the time and place of the election, and rule on the qualifications of voters. Many of these functions may be vested in an election committee, but * * * the administration group often dominates this committee. Although those in control are governed by the union constitution, its sketchy provisions leave substantial room to maneuver for critical advantages.

These dangers were known to the framers of Title IV, enacted as it was against the background of an extensive congressional inquiry which revealed how some union officials had been able to perpetuate their control of union office. See *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field*, S. Rep. No. 1417, 85th Cong., 2d Sess. Congress was aware that incumbent union officers enjoy considerable advantages in seeking re-election and that undemocratic procedures followed in one election can have a continuing impact on the outcome of subsequent elections. Provision was made for a supervised election to break the cycle. The Secretary was authorized to establish procedures for the supervised election which are designed not only to en-

sure that the election is conducted in a lawful manner under the union's constitution and bylaws⁵ but also to deny the incumbent officers any opportunity to favor the administration slate in making decisions—and he has done so.⁶

In sum, in regular, unsupervised elections the union itself determines the details of election procedures, because Congress wished only to prescribe minimum standards of fair procedure for union elections, believing that unions generally could be trusted with responsibility to work out the details of their own internal procedures in a fair manner. S. Rep. No. 187, 86th Cong., 1st Sess., p. 7. But once the Secretary has shown that a union has committed a violation of the Act which may have affected the outcome of an election, that trust is forfeited and it becomes

⁵ The supervised election must be held, "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization." 29 U.S.C. 482(c). However, subject to that limitation, the Secretary is authorized to prescribe rules and regulations for the conduct of supervised elections. 29 U.S.C. 482(b).

⁶ This is done principally by ensuring that incumbent officers do not control the election committee or otherwise decide the details of the election procedure. Thus, at a supervised election, the principal details are determined by the Department of Labor's supervisor in consultation with all interested parties at a pre-election conference. Matters remaining unsettled after the pre-election conference may be left to a union election committee, but incumbent officers seeking re-election, as well as other candidates for office, are not permitted to serve on the election committee. Where the union's constitution requires incumbent officers to perform functions in connection with the election, the incumbent seeking re-election must perform these functions under supervision and, upon request, under the observation of representatives of rival candidates.

necessary for the Secretary to control the details of the election procedure through supervision of a court-ordered election. The violation destroys the presumption of regularity that would otherwise attach to the union's conduct of its own election; the intervention of an unsupervised election is not sufficient to restore it. Even if it cannot be shown in a post-election investigation that the intervening election was conducted in violation of the Act, there can be no assurance that the unlawfully elected incumbents forewent the opportunities for manipulation that an unsupervised election permits. A laboratory election remains necessary to assure that the control achieved by violating the Act in the first election is not perpetuated by subtle means in the second.

The continuing public interest in the Title IV remedy, once suit has been validly initiated, was forcefully expressed by the court in *Goldberg v. Amalgamated Local Union No. 355*, 202 F. Supp. 844 (E.D.N.Y.), where the Secretary had filed suit to compel the holding of a local union election after the lapse of more than three years since the last election. After the suit was filed, the union held an unsupervised election. The court refused to dismiss the complaint, saying:

The filing of the complaint under the procedure outlined by Congress sets in operation the governmental machinery. To that point, the LMRDA gives the labor organization the opportunity to correct and remedy the violations. Beyond that point, the right of the government to investigate the breakdown of the democratic processes is clear. It is not within the power of the labor union to deprive the government of its right by compliance. The interest of the public goes beyond adherence to the form. The interest of the public has been called into play by the failure of the union to act. The substantial right of the Secretary cannot be capriciously brushed aside. [202 F. Supp. at 846.]

So saying, we suggest no novel principles. It is familiar law that the discontinuance of the particular practice challenged does not defeat the government's right to relief against a violation of law, unless it is clear that a decree is unnecessary to protect the public against the consequences of the violation. This is such a case. Full protection of the public interest is not assured by the mere fact that a subsequent election is conducted, even if the challenged practice appears to have been abandoned.

Also relevant is the principle that when important rights have been violated the remedy may go beyond restraining the plainly unlawful conduct and prohibit associated acts which would be permissible at the hands of others, or even the defendant, had they not been used to perpetrate the wrong. *E.g., United States v. Bausch & Lomb Co.*, 321 U.S. 707, 724; *May Department Stores Co. v. Labor Board*, 326 U.S. 376, 391; *Swift & Co. v. United States*, 276 U.S. 311. The effect of the relief asked by the Secretary in these

⁸ See, e.g., *Labor Board v. Jones & Laughlin Steel Corp.*, 331 U.S. 416; *Local 74, Etc. v. Labor Board*, 341 U.S. 707; *Porter v. Lee*, 328 U.S. 246; *Walling v. Helmerich & Payne*, 323 U.S. 37; *Walling v. Reuter Co.*, 321 U.S. 671; *Federal Trade Commission v. Goodyear Co.*, 304 U.S. 257; *Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498; *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290; *Mitchell v. Southwest Engineering Co.*, 271 F. 2d 427 (C.A. 8); *Marlene's Inc. v. Federal Trade Commission*, 216 F. 2d 556 (C.A. 7); *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307 (C.A. 7); *Goldberg v. Amalgamated Local Union No. 355*, 202 F. Supp. 844 (E.D.N.Y.); *United States v. Bates Valve Bag Corp.*, 39 F. 2d 162 (D. Del.).

cases may be to undo elections not themselves shown to be illegal, but that is necessary to assure the complete extirpation of proven wrongful conduct. Under the Voting Rights Act of 1965, a State may not enforce a literacy test, even a lawful one, if such a test was used at any time during the previous five years to abridge the right to vote on account of race or color. "Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants." *South Carolina v. Katzenbach*, 383 U.S. 301, 334. And both the registration and the voting process in areas where persistent violations have occurred are subject to detailed federal supervision. See 42 U.S.C. 1973 *et seq.* Here, too, something more than the abandonment of an unlawful practice is required to overcome the effects of past illegality and restore democracy.

It remains only to consider whether, within the framework of Title IV, there is any adequate alternative remedy for assuring that the taint of an unlawful election is thoroughly dissipated, other than directing a laboratory election notwithstanding an intervening unsupervised election.

C. THERE IS NO OTHER EFFECTIVE REMEDY UNDER TITLE IV TO ASSURE THE ELIMINATION OF THE ADVERSE EFFECTS OF AN UNLAWFUL ELECTION

We canvass here the possible alternative methods of guaranteeing representative union leadership in a situation where the union holds another election following the unlawful one—alternatives to the Secre-

tary's preferred remedy of an order in the suit challenging the first election directing that a new election be conducted under his supervision, without regard to the fact that the union has already held its next election.

1. Expedited proceedings

It is readily apparent that, in the ordinary course, a suit by the Secretary to declare an election void and obtain an order directing a laboratory election will more often than not be overtaken by the union's next election before it is prosecuted to its conclusion—as happened in the cases at bar. The Act itself requires unions to hold elections at least once every three years (29 U.S.C. 481(b)); many unions (including the local involved in No. 57) hold elections biennially; and some even conduct annual elections.⁹ The Secretary cannot, under normal circumstances, institute an action in the district court until at least six months after an election,¹⁰ and in most cases a trial is necessary since the issues—what procedures were followed, whether a particular practice was unreasonable in the

⁹ At least 3.5 million local union members elect their officers at intervals of two years or less. United States Department of Labor, *Union Constitutions and the Election of Local Union Officers* (1965), Table 5, p. 22.

¹⁰ First, a member must complain to the union. The union then has three months to render a final decision, and the union member one month after that to file a complaint with the Secretary. 29 U.S.C. 482(a). Sometimes the member awaits the union's final decision, which may take considerably more than the statutory minimum of three months, before filing a complaint. The Secretary then has sixty days to conduct the administrative investigation that is required before the suit may be brought. 29 U.S.C. 482(b).

circumstances, and whether violation, if established, may have affected the outcome of the election—usually involve disputed questions of fact. Thus, many times even the district court's judgment may be delayed until the next regular election. The danger is likely to be aggravated if unions know that to moot these suits they need only delay the proceedings until their next election.

If appeals are taken, it becomes virtually impossible to terminate the litigation (including action on an application for review by this Court) before the next biennial or triennial union election. To be sure, this holds true only if the district court refuses to order a supervised election and the Secretary appeals; Section 402(d) of the Act bars a stay pending appeal of a district court order directing a supervised election. However, as these cases illustrate, it is not uncommon for district courts to refuse the Secretary the relief he asks, and it seems hardly reasonable to suppose that Congress intended no judicial review of lower court rulings sharply curtailing the scope and efficacy of Title IV.¹¹

The vital importance to the effective and orderly administration of Title IV of permitting the Secretary to obtain appellate review is well illustrated by the two cases at bar. No. 57 involves the nature of the

¹¹ As a matter of fact, it is clear that Congress contemplated judicial review of election orders—which the mootness holdings of the court below hobbles. Compare Section 402(d) of the final Act, which expressly makes election orders appealable, with earlier bills providing that orders directing an election not be appealable (S. 3974, 85th Cong., 2d Sess., 104 Cong. Rec. 18263, and S. 3751, 85th Cong., 2d Sess.).

burden of proof resting on the Secretary to show that a violation of the Act "may have affected the outcome of an election."¹² Since the Secretary will not institute court proceedings unless he believes that the burden can be satisfied,¹³ the resolution of the question presented will shape the course of future investigations, and will in some instances control the decision whether suit should be filed. So, also, the question in No. 58, concerning the proper scope of the Secretary's complaint, has obvious practical importance for the whole Title IV enforcement program. Before the order dismissing portions of the complaint in this case, the Secretary had successfully maintained in the district courts his view that a valid complaint from a union member opens to investigation and judicial challenge the whole electoral process.¹⁴ Since that de-

¹² The same ruling has been reached more recently, on only slightly different facts, in *Wirtz v. Local 66, Glass Bottle Blowers Association*, 268 F. Supp. 33 (W.D. Pa.), June 1, 1967, which involves the same meeting attendance requirement. Since Local 66 is scheduled to hold its next regular election in September 1967, it is highly unlikely that an appeal can be completed in time under the Third Circuit's mootness holding.

¹³ The Interpretative Bulletin issued under the Act states (at 29 C.F.R. § 452.16(b)) : "Violations of the election provisions of the Act which occurred in the conduct of elections held within the prescribed time are not grounds for setting aside an election unless they 'may have affected the outcome.' The Secretary, therefore, will not institute court proceedings upon the basis of a complaint alleging such violations unless he finds probable cause to believe that they 'may have affected the outcome of an election.' "

¹⁴ Decisions favorable to the Secretary on this question had been rendered without opinion in *Wirtz v. Local 11, Hod Carriers* (ruling specifically referred to in 211 F. Supp. 408, at 412 (W.D. Pa.)); *Wirtz v. Local 611, International Hod Carriers' Union*, Civil No. 9512, D. Conn., motion for summary

cision, numerous Title IV defendants have raised the defense that the complaint went beyond the scope of the complaining member's internal protest.¹⁵ If the Secretary's view of his duty and authority under Title IV is correct, then he should not be required to litigate this question repeatedly. On the other hand, if the decision of the district court in this case was correct, then the Secretary should not be wasting his resources by full investigation of election complaints followed by comprehensive litigation based on his investigative findings.

While efforts at expedition might alleviate the problem to some extent, it is obvious that even expedited proceedings frequently cannot terminate a litigation involving both trial and appeals, as No. 58 illustrates. Had the Secretary sought leave to pursue an interlocutory appeal from the order dismissing portions of the complaint, it is doubtful whether even a district court decision could have been rendered on the merits before the union's next election. Moreover, the courts can expedite only the judicial, and not the anterior administrative, proceeding. That limitation aside, undue haste in the processing of election complaints at the administrative level could actually un-

judgment denied July 15, 1963; and *Goldberg v. District Council 21, Brotherhood of Painters*, Civil No. 30371, E.D. Pa., motion to dismiss denied March 31, 1962.

¹⁵ See *Local Unions Nos. 545, 545-A, 545-B, & 545-C, International Union of Operating Engineers v. Wirtz*, C.A. 2, No. 499, decided July 28, 1967; *Wirtz v. Hotel, Motel and Club Employees Union, Local 6*, C.A. 2, No. 513, decided July 28, 1967; *Wirtz v. Local 9, etc., Operating Engineers*, 366 F. 2d 911 (C.A. 10), certiorari granted and decision vacated, May 15, 1967 (see p. 39, n. 22, *infra*), which followed the narrow view of the instant case.

dermine the policies of Title IV. The Secretary may not bring suit unless and until the union has failed voluntarily to comply with the law. This requirement, as this Court pointed out in *Calhoon v. Harvey*, 379 U.S. 134, 140, "is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts."¹⁶ Since settlement efforts frequently take time, the Secretary often obtains waivers in order to permit the negotiations to extend past the sixty-day period allowed by the Act for bringing suit.¹⁷ Fear of mootness, however, may induce the Secretary to file suit as quickly as possible, regardless of the effect on settlement efforts,¹⁸ while at the same time it may en-

¹⁶ In fiscal years 1963, 1964 and 1965, an average of 124 complaints per year were received by the Secretary, and an average of 17 complaints were filed in court. See Bureau of Labor-Management Reports, *Summary of Operations, 1963*, pp. 8, 11; U.S. Department of Labor, *Summary of Operations, 1964*, *Labor-Management Reporting and Disclosure Act*, p. 6; U.S. Department of Labor, *1965 Summary of Operations, Labor-Management Reporting and Disclosure Act*, p. 7.

¹⁷ In some cases, the holding of a supervised election is provided for by the settlement. Considerable time must be taken in preparing for the supervised election, during which interval the Secretary preserves his right to file a complaint by obtaining waivers of the limitations defense.

¹⁸ To be sure, settlement negotiations may continue after the filing of a suit. However, the commencement of litigation generally stiffens the position of the parties and makes settlement more difficult. For example, before suit is filed the union may be amenable to settlement because it wishes to avoid the adverse publicity of a lawsuit, but this factor, of course, disappears once the suit is filed.

courage the union to engage in protracted negotiations so as to frustrate judicial enforcement should agreement not be reached. Either way a climate of voluntary compliance is impaired.

2. A new suit challenging the second election

This alternative may be quickly dismissed. Such a suit would be just as likely as the first suit to be overtaken—and hence, under the rule of the courts below, mooted—by the union's next election. And it would be no remedy at all in cases (like No. 58) where the vice of the second election lies, not in the fact that the union continues to impose the restriction challenged in the first suit, but in the danger that the officers elected unlawfully in the first election may have been able to perpetuate their office in the second through their control of the electoral machinery, without, however, committing any demonstrable violation of law.

Nor is the futile remedy of a second suit mandated by the complaint-and-exhaustion requirement of the Act. Where, as in No. 57, the union has already refused to change its candidacy qualifications, there would be little point in requiring a union member again to file an internal complaint and exhaust internal remedies. Moreover, a member of Local 153 who could not meet the attendance requirement in 1965 would not be likely to renew his attempt to run for office and then pursue an internal complaint if disqualified, knowing that the previous attack on the attendance requirement at the 1963 election had failed. If, as in No. 58, the second election is not provably

marred by a violation of Title IV, the member would have no basis in the Act for filing any new complaint.

3. An injunction against the holding of another election pending completion of the Secretary's suit

The Second Circuit has suggested that the Secretary might obtain, *pendente lite*, a stay of an election that would moot his Title IV action (see pp. 16-17 and n. 1, *supra*). This remedy, which has no foundation in the Act, seems completely anomalous. It places the Secretary in the untenable position of asking the court to maintain in office, beyond the expiration of their terms, the very union officials whose election he is challenging as unlawful. It unwarrantedly interferes with the union's rules prescribing the intervals at which elections should be held in disregard of the congressional policy of minimum interference in union electoral affairs (*supra*, p. 18). In some cases it may even conflict with the Act's explicit directive that union elections be held no less often than every three years. And it is inconsistent with at least the spirit of Section 402(d). That provision precludes a stay pending appeal of an order directing a supervised election, thus indicating, we think, that Congress did not intend that elections should be delayed owing to the pendency of Title IV litigation.

4. An injunction against the practice found to violate the Act

Arguably, the Secretary should be free to challenge not only the election itself, but the unlawful electoral practice, and to obtain an injunction against the continuation of the practice in any future election. However, in many cases this remedy would be wholly

inadequate. It would do nothing to prevent unlawfully elected officers from perpetuating their office by control of the electoral machinery—only a laboratory election is calculated to eliminate this harmful effect of an unlawful election. Beyond this, it is very doubtful that the Act empowers the courts to afford such injunctive relief, at least in the kind of case involved here. *Wirtz v. Hotel, Motel and Club Employees Union, Local 6*, C.A. 2, No. 513, decided July 28, 1967.

Title IV does not expressly provide for injunctive relief. The only remedy specifically provided in the statute is an order setting aside the challenged election and directing a supervised election. While the absence of express provision for injunctive relief is not, of course, conclusive (cf. *United States v. Republic Steel Corp.*, 362 U.S. 482), there is evidence that the omission here was deliberate.

For one thing, the enforcement provisions of other titles of the Act provide specifically for injunctive relief. Sections 102, 210, 304, 29 U.S.C. 412, 440, 464. Particularly relevant here is the enforcement section of Title III (Trusteeships), which permits the Secretary to obtain "such relief (including injunctions) as may be appropriate." 29 U.S.C. 464. Title III is otherwise quite similar to Title IV in its enforcement provisions. It provides (29 U.S.C. 464) for complaint by a union member, investigation of the complaint by the Secretary, a finding of probable cause by the Secretary to believe there has been a violation, and then a civil action by him. It seems unlikely that the omission from Title IV of the provision for injunctive relief found in Title III was completely inadvertent.

Moreover, several of the bills rejected by the Congress would have expressly authorized injunctions against future violations of the election provisions. The principal House bills—including the version that passed the House—provided for a civil action “to prevent and restrain such violation [of section 401].” H.R. 8342, 86th Cong., 1st Sess., Section 402(a), 105 Cong. Rec. 15707–15708, 15887; H.R. 8400, 86th Cong., 1st Sess. Both the administration’s Senate bill and Senator McClellan’s bill also provide for injunctions. S. 748, 86th Cong., 1st Sess., Section 302(d), 105 Cong. Rec. 1277; S. 1137, 86th Cong., 1st Sess., Section 403(a), 105 Cong. Rec. 2666. Nevertheless, the final Act did not provide injunctive relief for violations of Title IV.

Perhaps, in some extraordinary cases, a remedy not expressly provided in Title IV should be implied to achieve the overall congressional purposes. Thus, for example, when a union held a new election under the Secretary’s supervision but refused to install the officers elected, suit was filed to compel their installation.¹⁹ When ballots were altered before a recount to change the result of an election, the Secretary filed suit for the installation of the candidate who had received the most votes.²⁰ In these cases, since the elec-

¹⁹ *Wirtz v. Local 85, Laborers' International Union*, D. Ore., Civil Action No. 66-221. After a pre-trial hearing, the union agreed to install the officers elected in the supervised election.

²⁰ *Wirtz v. Local 36, United Automobile Workers*, E.D. Mich., S. Div., Civil Action No. 27901. The case was eventually settled by installation of the properly elected candidate. The problem in that case was similar to one that occurred in the election of the national president of the International Union

tion itself was not tainted by illegality, to have directed a re-run would needlessly have interfered with the union's electoral process, contrary to the congressional scheme. Therefore, it was urged that a proper order would be one limited to the invalid portion of the election, *i.e.*, the installation of officers.²¹ And in *Wirtz v. Local 1752, ILA*, 56 L.R.R.M. 2303, 2306 (S.D. Miss.), the court enjoined the union from post-election discrimination against the member who had filed a Section 402 complaint, noting that "the Secretary of Labor's enforcement responsibilities would be thwarted and the public interest harmed" if a complainant could not be protected from such reprisal.

Clearly, however, the usual statutory remedy for an illegal election—and, as mentioned, in many cases the only effective one—is a laboratory election; and in the present cases, such relief is appropriate and should be deemed available.

of Electrical, Radio and Machine Workers in 1964. An investigation by the Secretary of Labor disclosed that the ballots had been miscounted. The candidate who had erroneously been declared elected resigned, and his opponent was installed in office. See U.S. Department of Labor, *1965 Summary of Operations, Labor-Management Reporting and Disclosure Act*, pp. 7-8; 88 *Monthly Labor Review* 562-565 (1965).

²¹ But in *Wirtz v. Teamsters Industrial and Allied Employees Union, Local No. 73*, 257 F. Supp. 784 (N.D. Ohio), the court denied a motion to dismiss a complaint alleging, *inter alia*, that certain newly-elected officers had been improperly coerced into resigning immediately following their installation. There, an adaptation of the statutory remedy would have been unavailable, since the alleged violation occurred after the election was over. (The case was settled.)

In sum, within the framework of Title IV, effective relief against unlawful elections will in many cases be impossible unless the Secretary's right to an order directing a supervised election is recognized, whether or not the union has held another election since the one challenged in the Secretary's suit. In the circumstances, the Court would be fully justified in fashioning a remedy appropriate to carry out the statutory purpose. Compare *United States v. Republic Steel Corp.*, 362 U.S. 482; *Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548. But no creative effort is required here. Nothing in Title IV makes an intervening union election a bar to an order directing a laboratory election if the previous election was voidable. We plead only for a liberal application of the statute, faithful to its true purpose.

II. IN NO. 58, THE DISTRICT COURT ERRED IN HOLDING THAT THE SECRETARY IN HIS SUIT MAY NOT CHALLENGE THE GENERAL ELECTION IN WHICH THE VIOLATION COMPLAINED OF OCCURRED, OR CHALLENGE THE ELECTION OF OTHER OFFICERS, BECAUSE THE UNION MEMBER SPECIFICALLY CHALLENGED THE VIOLATION ONLY AS IT AFFECTED THE RUN-OFF ELECTION HELD WITH RESPECT TO A SINGLE OFFICE FOR WHICH THE COMPLAINANT WAS A CANDIDATE

In dismissing the appeals in these two cases as moot, neither court of appeals considered whether the district court had been correct in its ruling on the merits of the Secretary's complaint. If this Court agrees with us that the appeals are not moot, it could of course remand the cases to the courts below to consider the merits of the appeals. On the other hand,

it would not be inappropriate to now resolve the important questions involved (which we discuss in this and the following part of our argument). The issue in No. 58 especially—whether the Secretary's suit may raise issues not specifically presented in the internal complaint—is closely related, as will appear, to the mootness question; and it has been fully considered by two courts of appeals already.²² Moreover, both questions are extremely important to the administration of Title IV and should be decided promptly in order to provide guidance in the mounting litigation under the Act.

We begin with No. 58. The issue presented by the Secretary on his appeal was whether the district court erred in striking those portions of the Secretary's complaint directed to the conduct of the general election on June 8, 1961, and concomitantly, in limiting the supervised election to a single office, that of Business Representative.²³

The complaint to the union specifically questioned only the run-off election held on July 13, 1963, for the

²² See cases cited *supra*, p. 31, n. 15. Our petition for a writ of certiorari to review the decision in *Wirtz v. Local Unions Nos. 9, 9-A and 9-B, International Union of Operating Engineers*, 366 F. 2d 911 (C.A. 10), presented this question, but shortly thereafter, the respondent agreed to allow the Secretary to supervise the election of all officers, rather than only that involving the office with respect to which an administrative complaint had been filed. Accordingly, at the joint suggestion of the parties, the Court, on May 15, 1967, vacated the judgment below and ordered the suit dismissed as moot.

²³ The run-off election challenged in the union member's complaint involved only that office since it was the only one as to which the general election had resulted in a tie, requiring a run-off.

office of Business Representative. The complaint charged that that election had violated Title IV in that some members ineligible to vote because of non-payment of dues had been allowed to vote while others ineligible on that ground had been prevented from voting. The court directed a supervised election limited to a re-run of the run-off election for this post. Despite the Secretary's allegation that the same violation had occurred at the preceding general election, held on June 8, 1963, and had tainted the races for all offices, the court did not permit the Secretary to challenge the validity of the general election. In our view this was error.

A. THE ADDITIONAL ISSUES RAISED IN THE SECRETARY'S COMPLAINT WERE FAIRLY WITHIN THE SCOPE OF THE UNION MEMBER'S COMPLAINT TO THE UNION

Title IV, as already noted, provides that before filing suit the Secretary of Labor must receive a complaint from a union member who either exhausted his internal remedies within the union or invoked such remedies without obtaining a final decision within three months. 29 U.S.C. 482 (a), (b). Although the language of the statute is not entirely unambiguous, it appears that the Secretary's suit may only question the election that was the subject of the union member's internal complaint.²⁴ Since both the general election

²⁴ Section 402(a), 29 U.S.C. 482(a), provides that the "challenged election [referring to the election challenged by the union member in his complaint to the Secretary] shall be presumed valid pending a final decision thereon (as hereinafter provided) * * *." The statute goes on to authorize a suit by the Secretary "to set aside the invalid election * * *." 29 U.S.C. 482(b). The court is directed, if it finds that a violation may

held on June 8, 1963, and the run-off held on July 13, 1963, were part of a single process designed to select the officers of the union for the following three years, we view both together as constituting a single "election" for purposes of the statute.²⁸

This common sense result is strongly suggested by the scheme of the Act. Title IV provides the exclusive remedy "for challenging an election already conducted" (Section 403) and it permits a protest and court challenge only after the election has been completed. See *Wirtz v. Local 30, International Union of Operating Engineers*, 242 F. Supp. 631, 633 (S.D.N.Y.) (citing this Court's decision in *Calhoon v. Harvey*, 379 U.S. 134); *Wirtz v. Great Lakes District Local 47, Masters, Mates & Pilots*, 61 L.R.R.M. 2010 (N.D. Ohio). An election that requires a run-off has not been completed. Moreover, Section 402(c) provides for judicial relief only if it is shown that a violation of the Act "may have affected the outcome of an election." Obviously, the outcome of an election which necessitates a run-off cannot be known until the completion of the run-off. Yet if the run-off in a case like No. 58 were viewed as a separate election, the complainant would have to lodge his internal union protest prematurely—before the run-off was held—since more than the 30-day period provided in respondent's constitution for the filing of election

have affected the outcome of "an election," to declare "the election" void and direct the conduct of a new election under the supervision of the Secretary. 29 U.S.C. 482(c).

²⁸ Webster's *Third International Dictionary* defines "election" as "the act or process of choosing a person for office, position, or membership by voting."

protests elapsed between the general election and the run-off.²⁰

Defining "election" in this manner is fully consistent with the internal exhaustion requirement of Title IV, which was designed to preserve "a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections." S. Rep. No. 187, 86th Cong., 1st Sess., p. 21; see *supra*, p. 18. When the international union received a complaint that the local had been following a practice which resulted in improperly qualifying certain members to vote, the international should have realized that the same practice had probably been followed in the general election which preceded, and necessitated, the run-off. And any serious investigation of the complaint would have shown that the Secretary Treasurer's practice of subsidizing the eligibility of some union members was enforced, not only at the run-off election, but also at the general election, held only six weeks previously. Thus, the policy of the exhaustion requirement—giving the union a chance to clean its own house—is served by permitting the Secretary to sue in respect of the general election on the basis of a complaint about the conduct of the run-off.

²⁰ We do not mean to imply that a run-off cannot be separately considered for any purpose under Title IV. If purely procedural irregularities are involved (e.g., denial of a secret ballot, or failure to give the 15-day statutory notice), then the run-off may be the only defective part of the election, and the only part which requires corrective action. However, in the present case, the violations infecting the run-off were merely the continuation of the violations permeating the general election, and attributable to the same cause.

Once it is acknowledged that the run-off election was an integral and inseparable part of the general election which necessitated it, then the question arises whether the Act's internal-exhaustion requirement provides any justification for restricting the Secretary's suit to the particular office concerning which complaint was made. We submit that the purpose of the exhaustion requirement is not undermined by permitting the Secretary to question the election for other offices besides the one specified in the internal complaint, particularly where, as here, the same violations were alleged with respect to those other offices. The international cannot complain, in these circumstances, that it was deprived of an opportunity for voluntary correction by being confronted with the violation for the first time in the Secretary's suit. The illegality was fully disclosed by the internal complaint, albeit it focused only on a single union office.

There might be merit in the argument that the Secretary's suit is limited to the office as to which an internal complaint was made—despite the fact that the violation specified in the complaint affected other offices—if the Secretary's sole function in Title IV litigation were to vindicate the rights of a disappointed candidate. On this theory, since the complaining member in No. 58 asserted only his interest in running for the office of Business Representative, the Secretary's suit on his behalf should be similarly limited. However, as already explained (*supra*, pp. 17-19), the Secretary has a broader role in Title IV litigation: to represent the interest of all the members of the union in having officers responsive to their

needs and to assert the public interest in democratic labor unions. As this Court noted in *Calhoon v. Harvey*, 379 U.S. 134, 140, "Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." The "special knowledge" of the Secretary would be poorly utilized if he could function under Title IV only as the champion of a particular complainant.

B. EVEN UNRELATED VIOLATIONS, DISCOVERED IN THE COURSE OF THE SECRETARY'S INVESTIGATION OF A UNION MEMBER'S COMPLAINT, MAY BE RAISED IN THE SECRETARY'S ACTION

While we have suggested that the question of judicial power to remedy the additional violations challenged by the Secretary in his suit in No. 58 may be decided on the ground that they were within the scope of the internal complaint, an alternative ground of decision suggests itself—one that we believe superior from the standpoint of statutory policy and sound administration. We deem it neither appropriate nor necessary to the scheme of Title IV that the Secretary be precluded from invoking the aid of the courts to correct any violation that he discovers in the course of investigating a union member's complaint. Moreover, we think the trial of election cases should not be burdened with difficult collateral questions as to whether a particular violation may properly be considered comprehended within the allegations of the internal complaint. Here, an affirmative answer to the question is readily forthcoming, but in other cases it will be more difficult and we do not believe that

the terms or policies of Title IV requires the court to indulge that debate.

The language of the statute itself imposes no restrictions on the scope of the Secretary's suit. Indeed, it does not even explicitly require that the suit challenge the particular violation specified in the union member's internal complaint; the Secretary is empowered to bring suit if, after investigating the complaint, "he finds probable cause to believe that a violation of this subchapter has occurred." 29 U.S.C. 482(b) (emphasis added). This general language was not inadvertent. One of the bills considered by Congress provided that when a member complained to the Secretary of a violation of the Act, the Secretary was to investigate "such allegation," and bring an action only if he found "probable cause to believe that such allegation is true" (S. 1002, 86th Cong., 1st Sess., 105 Cong. Rec. 2067). The Conference Committee adopted the broader view, reflected in the Senate Report, that the Secretary was "to investigate the complaint and determine whether there is probable cause to believe that an election was not held in conformity with the requirements of the bill." (S. Rep. No. 187, 86th Cong., 1st Sess., p. 21.)

Congress provided a sixty-day period for the investigation of election complaints and gave the Secretary sweeping investigative powers. These powers are far more extensive than those which would have been available to an individual union member under the private enforcement scheme of the House bills (see *Wirtz v. Local 191, Teamsters*, 321 F. 2d 445 (C.A. 2); *Local 57, International Union of Operat-*

ing Engineers v. Wirtz, 346 F. 2d 552 (C.A. 1)), and would be unnecessary if the Secretary's responsibility were merely to verify the allegations of an individual member's protest. Congress could not have intended so to restrict the Secretary when it must have been anticipated that, by the use of his broad investigative powers, he would frequently discover other serious violations of the Act hidden from a complainant or overlooked by him. To confine his challenge of an election to those violations complained of by the union member would disable the Secretary from using the fruits of his investigation to remedy the violations disclosed thereby, and would tend to frustrate the congressional purpose of ensuring free and honest elections. For example, a member might complain that he was improperly denied the right to vote. The Secretary's investigation might disclose that, unknown to the protestant, the ballot box had been stuffed. Under the rationale of the district court's decision, the Secretary would be powerless to act on the latter violation. The decision would place a premium on the ability of the union officers to conceal violations from their members.

The facts in No. 58 well illustrate the incongruity of limiting the Secretary to the precise allegations of the complaining union member. The complainant, Dial, was apparently able to secure evidence that nine ineligible members had been permitted to vote in the run-off election of July 13, 1963. The Secretary, upon investigation, quickly ascertained that a vastly larger number of ineligible members had been permitted to vote in that run-off election, and, further, that the

cause of this disregard of the union's own constitution was the Secretary-Treasurer's practice of "carrying" some delinquent members by making it appear that they had met their dues obligations when in fact they had not. An examination of the records which disclosed the true status of respondent's members with respect to the payment of dues also disclosed that ineligible members had been permitted to be candidates, as well as to vote, and that the violations complained of had permeated the general election as well as the run-off. It is doubtful whether the complainant could have gained access to these records to support his election protest. It may be assumed that he was unaware of the ineligibility of the candidates who opposed him. Congress, having given the Secretary broad investigative authority, cannot have intended that he be hamstrung by the ignorance of the complaining union member, by the artlessness of his protest, or by the lack of evidence available to him in support of his objections.²⁷

²⁷ The role of the Secretary may be compared to that of the General Counsel of the National Labor Relations Board in investigating unfair labor practice charges under the Taft-Hartley Act. While the Board's General Counsel (like the Secretary, under the Labor-Management Reporting and Disclosure Act) can issue a complaint only after receipt of a charge, he may on his own initiative include in his complaint unfair labor practices concerning events which have occurred after the original charge was filed with him. The Supreme Court discussed the role of the Board in unfair labor practice proceedings—in language equally applicable to the function of the Secretary of Labor under Title IV—in *Labor Board v. Fant Milling Co.*, 360 U.S. 301, 307-308:

A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private

Finally, the practice of the Secretary in investigating fully the conduct of every election concerning which he receives a complaint, and in including in his suit allegations of all uncorrected violations that are substantial, is not opposed to the policy—which underlies the requirement that a union member protest the conduct of an election internally before filing a complaint with the Secretary—"to allow unions great latitude in resolving their own internal controversies * * * before resort to the courts." *Calhoon v. Harvey*, 379 U.S. 134, 140. For, it is also the Secretary's policy to notify the union in advance of filing suit of all violations disclosed by his investigation, so that the union may take voluntary corrective action. Thus, in No. 58, at the conclusion of the Secretary's investigation, both the respondent local union and the international were advised of his discovery of the mass ineligibility of voters and candidates in both phases of the election and of the underlying cause. When the international requested particulars, the

lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. * * * The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest * * *.

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights, which Congress has imposed upon it.

Secretary's attorneys met with attorneys representing the international and furnished them with detailed information concerning the Secretary's findings. Yet, the international refused to recognize or correct any violation in the general election of June 8, 1963. The union had notice of all the violations disclosed by the investigation and deliberately forewent an opportunity to take voluntary remedial action before suit was filed—no less than if the internal complaint had specifically challenged the additional violations.

In sum, to confine the Secretary's suit either to the precise violations alleged in the internal complaint or even to violations within the general scope of that complaint would unwarrantedly and unnecessarily impede the congressional goal of union democracy.

III. IN NO. 57, THE DISTRICT COURT ERRED IN NOT FINDING THAT THE 75-PERCENT ATTENDANCE REQUIREMENT "MAY HAVE AFFECTED" THE OUTCOME OF THE 1963 ELECTION

Section 402(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(c), requires the court to void an election tainted by a violation of Section 401 which "may have affected the outcome." Congress deliberately chose this language to relieve the Secretary of the burden of showing that a violation actually did affect the result. S. 1555, the bill passed by the Senate, contained the "may have affected" language. 105 Cong. Rec. 16150. H.R. 8342, the bill passed by the House, as well as the Kennedy-Ervin bill as originally introduced in the

Senate (S. 505, 86th Cong., 1st Sess., 105 Cong. Rec. 892), required a showing that the violation "affected" the outcome. 105 Cong. Rec. 15887. Faced with a choice between these formulations, the Conference Committee adopted the "may have affected" language. Conf. Rep. No. 1147, 86th Cong., 1st Sess., pp. 33-35. Senator Goldwater explained (105 Cong. Rec. 19765):

The Kennedy-Ervin bill (S. 505), as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless. Minority members in committee secured an amendment correcting this glaring defect and the amendment is contained in the conference report.

It is hardly debatable that the 75-percent attendance requirement in No. 57 "may have affected" the outcome of the 1963 election. It rendered more than 97 percent of the membership ineligible to stand for union office, leaving only ten eligible members in a union of 500 members. Indeed, no candidates were even nominated for four of defendant's eight elective offices (recording secretary and three trustees), and four members who were themselves ineligible under the 75-percent attendance requirement were appointed to those positions in violation of the union constitution and bylaws and of Section 401(b) of the Act, 29 U.S.C. 481(b), which requires a union to "elect its officers."

So drastic a limitation of eligible candidates can-

not be assumed to have had no probable or possible effect on the outcome of the election. Here, as it happens, one candidate who was actually nominated—John L. Miller, who filed the complaint that triggered the Secretary's suit—was disqualified from running by reason of the challenged attendance requirement. And surely the Second Circuit ruled correctly in *Wirtz v. Local Unions 410, Etc.*, 366 F. 2d 438 (C.A. 2), that *any* exclusion of willing candidates from the ballot may affect the election's outcome. As the court explained (366 F. 2d at 443) :

The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8-1 margin, the proviso should prevent upsetting the election. Compare *Wirtz v. Local 11, International Hod Carriers*, 211 F. Supp. 408 (W.D. Pa., 1962). But in the cases at bar, the alleged violations caused the exclusion of willing candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on out-

come must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here.

But we do not rest on that circumstance. Normally, it is impossible to establish whether additional candidates would have run even if the attendance requirement had not been in effect or whether those candidates would have lost if they had run. Such questions are hardly susceptible of proof; the statutory test of "may have affected" was designed to avoid such elusive and treacherous inquiries.

In sum, any mass disqualification of candidates, we suggest, satisfies the "may have affected" test and likewise any disqualification of avowed candidates. Under either standard, the district court here erred in finding that the unlawful attendance requirement was beyond its remedial powers under Title IV.

CONCLUSION

The judgments of the court of appeals should be reversed and the cases remanded to the appropriate district court. In No. 57, the district court should be instructed to enter an order directing a supervised election as requested by the Secretary. In No. 58, the district court should be instructed to decide whether the additional allegations of the Secretary have merit and, if so, to order the supervised election requested by the Secretary in that case.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

The Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401, *et seq.*) provides in pertinent part:

SEC. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations,

employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

* * * * *

SEC. 401. (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor

organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) In any election required by this section

which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

(f) When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall pre-

serve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title.

(i) The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h).

SEC. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within

one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organi-

zation. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

SEC. 403. No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive.

* * * * *

SEC. 601. (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to

interested persons or officials concerning the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

OCT. 2 1967

JAMES F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 57.

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

LOCAL 159, GLASS BOTTLE BLOWERS ASSOCIATION
OF THE UNITED STATES AND CANADA, AFL-CIO.
Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Third Circuit.

Brief and Appendix for Respondent

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967.

No. 57.

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE
UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinions below are adequately set forth in the Secretary of Labor's Brief, pp. 1-2.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Secretary of Labor's Brief, p. 2.

QUESTIONS PRESENTED.

1. Whether the Secretary's action to set aside an allegedly invalid election is rendered moot if, pending appeal from an adverse judgment of the district court, the union conducts its regularly scheduled election.
2. Whether the district court correctly determined that the union's eligibility requirement rule for would-be candidates did not affect the outcome of the 1963 election.

STATUTE INVOLVED.

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 401 et seq., are set forth in the Appendix of the Secretary of Labor's Brief, pp. 55-62.

STATEMENT OF FACTS.

After a union member had complained to the Secretary of Labor that he had been disqualified as a candidate for local union office in Respondent Union's 1963 election because the complainant had not attended the required number of union meetings, as per the Local Union's Bylaws, the Secretary of Labor instituted an action, under Section 402 (b) of the Labor-Management Reporting & Disclosure Act of 1959, 73 Stat. 534, 29 U. S. C. 482 (b). The Secretary alleged that the election held by Respondent Union on October 18, 1963, violated Sections 401 (b) and (e) of the 1959 Act, and sought to have (1) the October 1963 election declared null and void, and (2) a court order for a new election conducted under his supervision.

The complainant in this action, John L. Miller, was elected Treasurer of Local 153 in 1959. Having attended 75% of the meetings held by the local union during the two years preceding the 1959 election, he had met the requirements of the meeting-attendance requirement rule, adopted by the delegates to the 1957 International Convention of the Glass Bottle Blowers Association, and was therefore eligible to become an officer. He was re-elected to the position of Treasurer in 1961—he again was eligible because he had met the requirement of the 75% Rule during the two years preceding the 1961 election.

At no time prior to his disqualification as a candidate for the 1963 election did Mr. Miller voice any objection to the meeting-attendance requirement rule for would-be candidates or complain about its unreasonableness. However, when Mr. Miller was nominated for the office of President on August 8, 1963, and to the office of Treasurer on September 12, 1963, he was declared ineligible as a candidate since he had neglected to attend the required number of meetings.

Soon after the Local Union had conducted its regular 1963 election, in a letter to the President of the International

Union, Lee W. Minton, Mr. Miller protested his ineligibility for local union office and requested that he be permitted to run for office (R. 17). On October 28, 1963, International President Minton acknowledged receipt of Mr. Miller's letter and appointed International Representative Joseph Bonus to make an investigation of the Miller protest (R. 11).

Section 13 of Article IV of the Union's Bylaws provides:

"... The record of attendance compiled by the Secretary is the final local authority to determine eligibility for local office, the election of delegates to National Conventions or such other meetings requiring elections."

After an examination of the attendance record book of Local 153 (in which the attendance or excused absences of every member at each meeting is recorded by the Recording Secretary), the International Representative, Mr. Bonus, found that Mr. Miller had been absent from the November 1961 meeting, the July, September and October meetings of 1962, and the February, June and July meetings of 1963.¹ Accordingly, the International recommended that Mr. Miller's protest be denied (R. 11).

In further pursuit of Mr. Miller's objection, International President Minton appointed two members of the Executive Board to investigate the situation (R. 11). These investigators upheld the findings of International Representative Bonus (R. 11). Notice of this was given to the complainant.

Dissatisfied with this result, Mr. Miller filed a complaint on January 31, 1964, with the Department of Labor, protesting the October 1963 election. The Secretary of Labor instituted the present action against the Union on March 31, 1964.

At both the pretrial conference and the hearing, Petitioner's counsel, in agreement with Respondent's counsel, and in response to the court's inquiry, made it clear that

¹ Although he was also absent from the August 1962 meeting because his wife was ill, Mr. Miller was given attendance credit for that meeting (R. 36).

this was not the case of a corrupt and untrustworthy clique which had established itself in office pursuant to the 75% rule (R. 8), and that there was but one issue to be litigated before the court: the reasonableness of the 75% Rule as embodied in the International Constitution and Respondent Union's Bylaws.

Between the pretrial conference and the trial, the parties stipulated, *inter alia*, that although candidates for local union office are required by the Bylaws to attend 75% of the regular monthly meetings, because they are involved in a continuously-operating industry and work on rotating shifts, a substantial majority of the members could qualify as candidates for local union office even though they had not attended 75% of the local union meetings (R. 15)—the Bylaws also provide that a member can receive meeting-attendance credit if he was at work at the time a meeting was held.

The district court, after a trial without a jury, ruled that although the 75% attendance requirement imposed by the Bylaws was an unreasonable qualification within the meaning of Section 401 (e) because of the limited "excuse" area, since there had been no showing that this violation of Section 401 (e) "may have affected the outcome of" the 1963 election—a requirement which Section 402 (c) expressly makes prerequisite to a judicial granting of relief—the district court would not order a new election. At the same time, the court noted that :

- (1) a new election was to be held within two months; and
- (2) the evidence clearly indicated that the complaining union member, John Miller, although himself an officer and aware of the meeting-attendance requirement rule, had "voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirement of the By-laws, but to his own voluntary unwillingness to comply therewith." (R. 47).

The Secretary appealed from the Judgment of Dismissal.

Seven weeks after the district court's ruling, Respondent Union conducted its regularly scheduled election of officers. Since, in the period between August 26, 1965, the date of the district court's decision, and October 12, 1965, the date of the subsequent election, there was not sufficient time to effect a change in Respondent Union's Bylaws re the rule regarding "excuses", the election was conducted under the then existing Bylaws.

Pursuant to an Order of Remand directed by the Court of Appeals for the Third Circuit, the Secretary filed a "Motion for Post-Judgment Relief" in the district court. Although no office-seeker or union member had filed a complaint about the conduct of the 1965 election, the Secretary sought a declaration from the district court that Respondent Union's October 12, 1965, election was invalid, and a court order which would require the union to hold a new election under the Secretary's supervision.

Finding "that no candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations" (R. 56), the district court refused to declare the October 1965 election invalid and refused to order a new election. The Secretary also appealed from the Order denying the post-judgment relief.

On review, the Court of Appeals for the Third Circuit held that the 1965 election of officers, as disclosed in the Secretary's post-judgment motion, made the original action challenging the 1963 election moot (R. 67), and that the challenge to the 1965 election must fail because no member of the union had filed with the Secretary a complaint seeking to invalidate that election (R. 67).

The Court of Appeals never reached the issue of whether the application of the 75% Rule, in this instance, may have affected the outcome of the election. However, the Judgment of the district court and the Order denying post-judgment relief were vacated, and the case was remanded to the district court "with instructions to dismiss the original

complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union members." (R. 69).

SUMMARY OF ARGUMENT.

I.

Two Courts of Appeals, the Second Circuit and the Third Circuit, have correctly determined that the issue of the validity of a complained-about election was rendered moot when, subsequent to the dismissals of the Secretary's Title IV actions, and before either appellate court could review the determinations of dismissal, the unions conducted their regularly scheduled local elections. A third Court of Appeals, the Sixth Circuit, concluded that the Secretary's appeal as to the scope of the district court's order of relief was also rendered moot: while the appeal was pending, the union had conducted its regularly scheduled election for all offices with the exception of the office of Business Representative which was conducted under the supervision of the Secretary in compliance with the district court's order.

The Secretary's actions are moot because: court invalidation, in whole or in part, of an election which has already been superseded by a subsequent election would be an exercise in futility—there no longer is an invalid election to set aside; and because the intervening election, which has rendered moot the issue of the setting aside of the prior election, is not subject to attack by the Secretary where no complaining union member has invoked the mandatory statutory procedure for challenging the union election. *Calhoon v. Harvey*, 379 U. S. 134 (1964). The respective Courts of Appeals recognized that the statutory scheme adopted by Congress, in Section 402, was in furtherance of its desire to keep governmental interference in the internal affairs of a union to a minimum. Consequently, judicial

review of election irregularities is unavailable to the Secretary unless (1) a complaining union member has exhausted his union's internal remedies or has been denied a final decision within three months after invoking his internal remedies, and such member has filed a complaint with the Secretary of Labor within one month thereafter; and (2) the Secretary has, after investigation of the complaint, found probable cause to believe that an unremedied violation has occurred. In addition, the court is precluded from ordering the union to conduct an election under the supervision of the Secretary: the Secretary's right to conduct a supervised election is contingent upon a finding that the officers of the union were invalidly elected, but unless a member of the union has exhausted his remedies and complained to the Secretary, the court cannot make a finding as to the validity of the election. Since the present union officers hold office pursuant to an unchallenged subsequent election, their right to a full constitutional term is not subject to judicial abortion just because a Title IV violation may have occurred in the previous election.

II.

The district court was of the opinion that when the local union's meeting attendance requirement rule was coupled with the local union's rule regarding excuses the number of candidates eligible to compete for local union office was severely limited and there was, therefore, a violation of the Act. However, before the district court could declare the 1963 election void and direct the conduct of a new election under the supervision of the Secretary, the district court had to make a finding that the alleged violation "may have affected the outcome" of the 1963 election. Since the evidence established that there was no causal relationship between the "existence of the unreasonable requirements of the By-laws" and the disqualification of the

complaining union member—a man who had “voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency,” the district court found that the Secretary had failed to establish that the alleged violation of Section 401 (e) had affected the outcome of the 1963 election. Under these circumstances, the district court correctly determined that it had no jurisdiction to set aside the 1963 election of the local union.

The trial court’s opportunity to observe the witnesses and to evaluate the evidence presented is entitled to great weight. Unless the reviewing court is thoroughly satisfied that the finding of the trial court is not supported by the evidence in the record, a trial *de novo* by the reviewing court should not be resorted to.

ARGUMENT.

I.

AN ACTION BY THE SECRETARY TO SET ASIDE A CHALLENGED UNION ELECTION IS RENDERED MOOT BY AN UNCHALLENGED INTERVENING ELECTION.

A. Statutory language and legislative history.

An analysis of Title IV’s statutory scheme reveals that the respective Courts of Appeals which have considered the issue of “mootness”² were clearly correct when they ordered dismissal of the Secretary’s actions: the holding of a subsequent election by the union had negated the need for

² The Second, Third and Sixth Circuit Courts of Appeals have considered the effect of a subsequent election on the Secretary’s action to have a complained-about prior election declared invalid, and have held that the holding of the subsequent election mooted the Secretary’s suit to have the challenged election set aside.

relief from an allegedly invalid election—thereby rendering the Secretary's action "moot", and the Secretary's attack on the subsequent election could not be sustained as permissible under any interpretation of the statutory provisions found in Title IV.

To begin with, the pertinent language of Section 402 (a) provides:

"A member of a labor organization —

(1) who has exhausted the remedies available under the constitution and bylaws of such organization . . . , or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of Section 401

. . . The challenged election shall be presumed valid pending a final decision thereon . . . and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide."

It was this clearly expressed statutory scheme which motivated the Second Circuit in the cases of *Wirtz v. Local Union 30, Int'l Union of Operating Engineers*, 366 F. 2d 438 (2d Cir. 1966) and *Wirtz v. Local 410*, etc., *IUOE*, 366 F. 2d 438, 442 (2d Cir. 1966) to hold that:

" . . . the Secretary has no standing to attack the 1965 elections since no member of Local 30 or of Local 410 has filed a valid complaint challenging them."

The Third Circuit, in the instant case, after it had examined the statutory scheme set out above, was also forced to conclude that the Secretary's:

" . . . challenge to the 1965 election must fail because no member of the union has filed with the Secretary a complaint seeking to invalidate that election."⁸

Both circuit courts recognized that since the enforcement provision contained in Section 402 (a) merely provides an

⁸ *Wirtz v. Local 153, GBBA*, 372 F. 2d 86, 87 (2d Cir. 1966).

administrative and judicial procedure for determining the validity of "a particular election", the Secretary could only seek to set aside *that* election which had been the subject of a complaint by a union member who had exhausted his union's internal remedies. Consequently, where no union member had challenged the validity of the subsequent election, the Secretary could not attack the validity of that election.

As for the challenged elections, both circuit courts were in agreement that:

"... It would serve no practical purpose with respect to these locals to declare [the superseded] elections void because the terms of office thereby conferred have expired . . ."⁴

The Secretary, in the *Local 153* case, was also forced to concede that "the holding of the 1965 election ha[d], of course, removed from the case any immediate need for declaring the 1963 election void, since the terms of office for which the election was held ha[d] expired."⁵ However, he contends that his action is not rendered moot because he is, nevertheless, entitled to supervise the union's next election. This contention is predicated upon the hypothesis that "the taint of the original election infects the next [election] and is only curable by the Secretary's 'laboratory' election."⁶ The flaws in the Secretary's proposition are patent.

Firstly, the abuses which existed in the original election may have been corrected by positive union action or may have been corrected by simple attrition. In Petitioner's brief, page 33, the Secretary argued that "the futile remedy of a second suit [is not] mandated by the complaint-and-exhaustion requirement of the Act. Where, as in No. 57,

⁴ *Wirtz v. Local Unions 410, etc., Int'l Union of Operating Engineers*, 366 F. 2d 438, 442 (1966). This language of the Second Circuit was adopted verbatim by the Third Circuit in *Wirtz v. Local 153 GBBA*, 372 F. 2d 86, 88 (1966).

⁵ Appellant's Brief to the Third Circuit, p. 17.

⁶ Brief for Petitioner, p. 19.

the union has already refused to change its candidacy qualifications . . ." This argument is deliberately designed to mislead the Court and overstates the Secretary's case. Following the dismissal of the Secretary's attack on the local union's 1963 election, and in response to the Secretary's motion for post-judgment relief from the local union's 1965 election, the district court pointed out on May 27, 1966, that it had been assured "that defendants in good faith and with due diligence [were] taking steps with all convenient speed to reform and amend the regulations governing elections so as to bring them into conformity with the views expressed in this Court's opinion . . ." (R. 56). The district court had been apprised of the fact that conferences regarding the settlement of the "75% meeting attendance requirement" issue and the International Union's area of excuses had been in progress between Secretary of Labor, W. Willard Wirtz, and Lee W. Minton, President of the International Union, or their respective representatives, since November, 1965. An expanded list of excuses was then proposed, in a letter on June 22, 1966, by President Minton to Secretary Wirtz (R. 58-60). Secretary Wirtz, while recognizing that the proposed changes would mitigate the disqualifying effect of the 75% rule, took the position that only a complete waiver of the meeting attendance requirement rule would prove satisfactory (R. 60-61). In effect, he took the arbitrary position that the 75% meeting attendance requirement rule was *per se* invalid, even though the rule also served a valid purpose. Despite the Secretary's assumption of this arbitrary position, the International Union, at its September, 1966, Executive Board meeting, in order to insure the greatest latitude for candidacy in local union elections, expanded the area of acceptable excuses so that more members could meet the candidacy requirement rule; and also adopted the suggestion of the trial judge that, in any event, at least "10 percent of the membership" shall be eligible to be nominated as candidates for local union office—so that the members have "a chance to choose between two full slates." In light of the adoption of a

substantially enlarged and liberal excuse area, it would appear that in substance the only time that a member of any of the local unions would not find himself credited with attending a sufficient number of meetings in order to meet the requirement of the 75% attendance rule would be where he deliberately absented himself from the meetings or had no interest whatsoever in union meeting attendance. The Secretary, through his representatives, has been made aware of this activity on the part of the International Union,⁷ and it is respectfully submitted that the argument referred to above should not have been made.

Secondly, there are no guarantees that the Secretary's "laboratory" election will provide the panacea for the union's so-called election ills.

Thirdly, there should be some positive nexus between the complained-about election and the subsequent election where an allegation of "taint" is submitted. Clearly, in the Local 153 case, there was no nexus, whatsoever, between the attacked 1963 election and the uncomplained-about 1965 election. Each election was a separate and distinct entity, and the validity of the 1965 election was not subject to attack merely because the 1963 election had been validly challenged. A complaint, filed by a union member who had exhausted his union's internal remedies, was required before the Secretary could launch his attack against the 1965 election. This requirement was not satisfied by the existence of a complaint which solely contested the validity of the 1963 election.

Even where there is arguably some nexus between a subsequent "run-off" election and the original election, a court may not entertain jurisdiction over the original election unless a complainant has challenged the validity of the original election. A complaint directed to the run-off elec-

⁷ The Secretary is, and has been, involved in litigation with several other Local Unions of the Glass Bottle Blowers Association—Local 257, Local 262 and Local 66. In each one of these cases the validity of the Respondent's 75% rule in relationship to the Local Union's area of excuses has been a bone of contention.

tion does not encompass the original election and consequently, cannot be used by the Secretary to bootstrap himself into a position where he may attack the original election. *Wirtz v. Local 125, Int'l Hod Carriers*, etc., 231 F. Supp. 590 (N. D. Ohio 1964). The nexus must be of a greater magnitude. Where there is not even the scintilla of a relationship between the two elections, the proscription on the court's jurisdiction is patent. And the Secretary's attempt to have the 1965 election conducted by Local 153 declared invalid and a supervised election ordered, when no union member has complained about any of its substantive or procedural aspects, is clearly *ultra vires*. It is settled law that the Secretary may not challenge a union election unless a union member has first complained about it. *Calhoon v. Harvey*, 379 U. S. 134, 140 (1964).

In addition, the Secretary must reconcile his attempt to have the unchallenged election declared invalid with the statutory presumption of validity which attaches to all elections—even challenged ones, and the statutory provision set forth in Section 402 (b) that the "Secretary shall . . . bring a civil action . . . to set aside the *invalid election* . . ." The fact that Congress expressly provided that even challenged elections were to "be presumed valid pending a final decision thereon" compels the conclusion that Congress meant to circumscribe an unchallenged election with an irrebuttable cloak of validity. And the fact that Congress linked the judicial ordering of a supervised election with the setting aside of an *invalid* election which had been properly challenged adds additional support to Respondent Union's contention that the gamut of the Secretary's authority was severely limited. Note that Section 402 (b) expressly provides that:

"The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred . . . he shall . . . bring a civil action . . . to set aside the *invalid election*, if any, and to direct the conduct of an election . . . under the supervision of the Secretary . . ." (Emphasis added.)

Clearly, it is only *the challenged election*, which is later found to be an "invalid election," and not just *any* election of the union which may be set aside—albeit the issue of the validity of the challenged election has become moot.

It is hardly subject to dispute that the precise words of the statute were the subject of much congressional debate and compromise. Congress' use of the word "challenged" to modify the word "election" in Section 402 (a) (2)—when it was concerned with the initiation of cases, and its subsequent use of the word "invalid" to modify the word "election" in Section 402 (b)—when it was concerned with setting aside elections, was not merely fortuitous. On the contrary, since it is patently expressive of Congress' intention that only invalid elections would be set aside, it must be given great weight.

Section 402 (c) lends further support to Respondent Union's position that where mootness intervenes and makes a court declaration as to the validity of a challenged election unnecessary, the court must dismiss the action unless a valid complaint attacking the supervening election has been filed. The pertinent language of Section 402 (c) requires the court, where there is a violation, to "declare *the election*, if any, to be void. . ." Under the recognized canons of grammatical construction, "the election" referred to in this subsection must unquestionably be the same "election" referred to in the immediately preceding subsection, i.e., the "invalid election" referred to in Section 402 (b)—since it is only where the union has failed to conduct an election within the prescribed statutory time (Section 401), or where there is a finding that there was a violation of Section 401 which "may have affected the outcome of an election" that a court may order a supervised election. Nevertheless, the Secretary would like to change, by judicial fiat, the express language of Section 402 (c) so that it reads "any" election of the union may be set aside if there is a finding that a Title IV provision has been violated in any of the union's previous elections. The clearly expressed

statutory language precludes such an extension of the Secretary's powers. And,

"Where the statute is clear and unambiguous, as we believe the provision now under consideration to be, there is no occasion for resort to the legislative record." *Wirtz v. Local 191, Int'l Brotherhood of Teamsters, etc.*, 321 F. 2d 445, 448 (2d Cir. 1963).

Nevertheless, an examination of the legislative history of the LMRDA leads one to the same conclusion reached by the three Courts of Appeals upon analysis of the statutory scheme, i.e., that since the Secretary's action is rendered moot where, during the time each case is on appeal, the union conducts its next regularly scheduled election, the court must dismiss the Secretary's action unless a union member has properly attacked the subsequent election.

The legislative history of the Act discloses that it was one of the most controversial efforts before the Congress in a decade. Two years of extensive public hearings pointed up the need for legislation that would not only guarantee the individual members a voice in the democratic control of the union's organization and protect the rights of individual union members, but which would also sustain the internal stability of union organizations.⁸

The adoption of Section 402, with its elaborate protections against unjustifiable interference with internal union processes, at a time when there was such great agitation for legislative control in the labor-management area, was the result of congressional recognition that there was also a concomitant need for restraint in regulating the internal affairs of unions. *Calhoon v. Harvey*, 379 U. S. 134, 140 (1964). Consequently, in compliance with this avowed purpose, Congress severely limited the Secretary's power

⁸ *Wirtz v. Local 9, etc., Int'l Union of Operating Engineers*, 366 F. 2d 911, 913 (10th Cir. 1966).

in Title IV cases, by providing an elaborate exhaustion scheme. *Wirtz v. Local Unions No. 9, etc., Int'l Union of Operating Engineers*, 366 F. 2d 911 (10th Cir. 1966).⁹

Note that even Professor Archibald Cox, the commentator who had made one of the most articulate pleas for legislative control in this area, and who had urged most strongly the passage of the Labor-Management Reporting and Disclosure Act, so as to preserve democracy within unions and to guarantee to every union member the right to make his voice heard in the formulation of union policy, viewed the exhaustion of internal remedies as a necessary part of the proposed legislation. In fact, he specifically rejected one form of proposed legislation, then pending, which would have given the government wide powers to regulate the internal affairs of unions.¹⁰

In his article, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 630 (1959), Cox said:

"The fundamental objection is that it would have turned over to an arm of the federal government the responsibility of carrying on the internal governmental processes of a labor union without any showing that the union officers and members were incompetent and corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."

⁹ If Congress had wished to entrust the Secretary with an open-end power, it could have so provided, as it did in the NLRA, for example, where it provided that the power to issue a complaint is not limited by an exhaustion procedure but rather by a time limitation: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge . . ." National Labor Relations Act, Section 10 (b), 61 Stat. 146, 29 USC Section 160 (b); *Local Lodge No. 1424 v. NLRB*, 362 U. S. 411 (1960).

¹⁰ *Wirtz v. Local 125, Int'l Hod Carriers', etc.*, 231 F. Supp. 590 (N. D. Ohio, 1964).

Commenting further upon the problem of union elections, Professor Cox pointed out that:

"Requiring the exhaustion of internal remedies would preserve a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections . . ." Id. at p. 633.

Despite this statutory analysis and legislative background, the Secretary seems to say that once he has the right to investigate and correct by suit one union election, this grants him *carte blanche* authority to reach the union's subsequent elections, even if his attack on the complained about election has been mooted by the holding of a subsequent election. However, the powers granted the Secretary under Title IV are not equal in magnitude to the powers granted to the Secretary in Title VI of the Act. In distinguishing the investigatory powers of the Secretary under Section 601 from the powers of the Secretary under Section 402, the First Circuit pointed out in *Local 57, IUOE v. Wirtz*, 346 F. 2d 552, 554 (1st Cir. 1965), that whereas the Secretary's authority to institute a court action to set aside a presumptively valid election "is conditioned upon the filing of a complaint by a union member who has exhausted his internal union remedies," his power to investigate an election is not conditioned upon the receipt of a complaint from an individual member of the union, *Wirtz v. Local 191, Int'l Brotherhood of Teamsters, etc.*, 321 F. 2d 445, 447 (2d Cir. 1963). Neither is his power to investigate contingent upon the establishment of probable cause or a reasonable basis for the investigation, *Goldberg v. Truck Drivers Local Union No. 299*, 293 F. 2d 807, 812 (6th Cir. 1961), cert. den. 368 U. S. 938 (1961). Through the media of such investigations, once information has been obtained and reports compiled, the Secretary, where he deems further activity necessary, may disseminate the fruits of his investigative activities to the rank and file members of the union. Of course, the more desirable

procedure is to first offer the accumulated information to the union officers so that they may have the first opportunity to cure any cancerous sores which may have infected the union—in consonance with the underlying legislative philosophy of fairness. If the officers fail to act, the information could then be made available to the union membership and the general public. Since disclosure, in and of itself, is a powerful weapon, it was anticipated that these disclosures would have a strong prophylactic effect on union abuses. Note that, in Section 601 (a) of the Act, Congress provided that:

“... the Secretary may report to interested persons or officials concerning the fact required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems appropriate as a result of such an investigation.” (Emphasis added.)

In formulating this broad grant of power to the Secretary, the Senate Committee on Labor and Public Welfare recognized that:

“... This provision insures that union members will have all the vital information necessary for them to take effective action in regulating the affairs of their trade union, either through voluntary compliance of the labor organization ... or as a result of investigation and reports by the Secretary of Labor.” Senate Report 187 on S 1555, I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, p. 405 (1959).

Clearly, the underlying philosophy of Section 601 is consonant with the philosophy expressed by the framers of Section 402 (a) and 402 (b) in Senate Report 187 on S 1555, I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, p. 403 (1959), i.e., that:

“Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs.” (Emphasis added.)

B. There is a condition precedent to the Secretary's power to supervise an election: there must be an invalid election still in existence which the Court can set aside.

In the *Local 153* case, the Secretary's action became moot because subsequent to the district court's decision, in accordance with the International's Constitution, the Local's By-Laws,¹¹ and the LMRDA's requirement that elections be held triennially (Section 401 [b]), Respondent Union conducted its October, 1965 election. Consequently, the present officers of the union are not holding office pursuant to the challenged 1963 election, but are holding office pursuant to the unchallenged and therefore valid 1965 election.

In *St. Pierre v. U. S.*, 319 U. S. 41, 42 (1943), the Court held that:

"The Federal Court is without power to decide moot questions or to give advisory opinions that cannot affect the rights of the litigants in the case before it."

See also *California v. San Pablo & Tulare Railroad Co.*, 149 U. S. 308 (1893), and *U. S. v. Alaska Steamship Co.*, 253 U. S. 113, 116 (1920), where this Court pointed out:

" . . . Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. . . ."

Since the rights of litigants are, *a fortiori*, "affected by the judicial remedies available, in evaluating whether a par-

¹¹ The International Constitution of the GBBA and the By-laws of Local 153 provide that elections for officers are to be held every two years. Since the election held on October 12, 1965, was in compliance with the Local's By-laws and the International's Constitution, there was no attempt on the part of the Union to render the issue of the 1963 election moot by holding a supervening election. It is also significant that at the time the 1965 election was conducted, no proceedings were pending; the district court had already ruled on the 1963 election, but had not ordered a supervised election, and no appeal from that court's decision had, as yet, been instituted.

ticular appeal has become moot, attention must be focused on the particular relief sought by the appellant." *Wirtz v. Local 410, et al.*, and *Wirtz v. Local 30, etc., supra*, at p. 442.

The installation of the officers elected in the 1965 election removed from office those officers elected in the 1963 election. Consequently, there was no need for the Third Circuit to declare the 1963 election void. Similar situations occurred in the *Local 125* case before the Sixth Circuit, and in the *Local 410* and *Local 30* cases which were before the Second Circuit Court of Appeals. When each of the three respective Courts of Appeals focused its attention on the relief desired by the Secretary, each recognized that it would be performing a vain act if it were to invalidate an election which had already been superseded by a subsequent validly held election.

Although the Secretary has on occasion recognized that the holding of a subsequent election may moot his action,¹² he argues that he is, nevertheless, entitled to conduct a supervised election. However, if the Secretary is allowed to conduct a supervised election, once a validly conducted election has been held, an anomalous situation will arise: validly elected union officers may be denied their right to hold office. Such a course of events would be in direct contravention of the express provisions of the statute—the Secretary's right to conduct a supervised election is dependent upon a judicial determination that there are *invalidly elected* officers in control of the union at the time a supervised election is ordered by the court. (Section 402 [b]). The holding of a regularly scheduled subsequent election destroys the predicate upon which the Secretary alleges his cathartic right is based, since allegedly invalidly-elected officers are no longer in office. The officers now in charge of the management of the union's affairs hold office

¹² Appellant's Brief to Third Circuit, p. 17. See discussion on p. 11, *supra*.

pursuant to a validly conducted election, and Congress has provided in Section 403 that:

"No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. . . ."

- The Secretary insists, however, that a "continuing need for a laboratory election exists when it is not known whether the violation [which gave] rise to the Secretary's suit persisted in the second election."¹³ Respondent Union will not belabor the exhaustion requirement which it considers is controlling in this situation, but instead it directs its attention to the Secretary's inference that the presence of a continuing controversy would entitle the Secretary to a supervised election even though the complained-about election may have been superseded by a validly conducted election. Although the federal courts have developed a doctrine which permits a court to consider a case which is moot on its exact facts, but which represents a continuing controversy between the parties, election cases have not been encompassed by this "continuing controversy" doctrine. *Cases Moot On Appeal: A Limit On the Judicial Power*, 103 U. of Pa. L. Rev. 772, 786 (1955).¹⁴ When faced with the election cases, the courts, in most instances, have advanced these cases to the top of the argument list in order to avoid mootness.¹⁵ Nor may the Secretary gain any support for his contention that the courts are empowered "to undo elections not themselves shown to be illegal" by his

¹³ Brief for Petitioner, p. 21.

¹⁴ **Shub v. Simpson**, 340 U. S. 861 (1950); **MacDougall v. Green**, 335 U. S. 281, 284 (1948) (concurring opinion); **DeHoff v. Imerson**, 153 Fla. 553, 15 So. 2d 258 (1943); **Brown v. Lieb**, 267 Pa. 24, 110 Atl. 463 (1920).

¹⁵ **Ray v. Blair**, decision reported, 343 U. S. 154, opinion reported, 343 U. S. 214 (1952).

reference to the Voting Rights Act of 1965, 79 Stat. 437, 42 U. S. C. 1973, *et seq.* (Petitioner's Brief, p. 27). On the contrary, the specific grant of power to the district courts to retain jurisdiction of election suits in voting rights cases "for such period as it may deem appropriate," along with the concomitant legislative grant of power to the district courts to issue injunctions, must be placed in juxtaposition with the lack of any such grant of power to the courts in LMRDA election cases. When so viewed, the conclusion is inescapable that Congress intended a narrow scope of authority for the courts in Title IV cases. Had it desired otherwise, it would have so provided.

The Secretary also invokes the doctrine of "public interest." Again he has placed "too great a weight on too frail a reed." The legislative history, discussed at Point I, *supra*, discloses that Congress sought, in the public interest, to insure: (1) that union organizations would reflect the will of the majority of their constituents, and (2) that there would be a minimum of governmental meddling in union affairs. In order to promote these objectives and in order to circumvent any unwarranted infringement on the autonomy of the union and the sovereignty of its members, the legislators provided rigid machinery through which complaining union members could vindicate their positions. Consequently, the rhetoric of "public interest" cannot be employed to mean that public rights outweigh the union's right to self-government. Nor can it be invoked to create the impression that they are diametrically opposed to one another. For when attention is focused on the union's right to maintain its autonomy and the public's right to impose minimum standards of conduct on the union, it is clear that they are in apposition to one another. Cf. *Int'l Union, Local 283 v. Scofield*, 382 U. S. 205, 217-221 (1965).

As the district court, in response to the Secretary's invocation of the doctrine of public interest, pointed out in *Wirtz v. Local Union No. 125, Int'l Hod Carriers' etc.*, *supra*, at p. 595:

"... It is highly significant that not one voice of protest has been heard from the membership against the conduct of that election. We do not think that the Secretary under the guise of 'public interest' may be permitted to complain when the membership has not; to hold otherwise would, in fact, be inimical to true public interest because it would require legislation by judicial fiat. If the members are satisfied, then the government ought to be satisfied."

Unless the Secretary can establish that he is the 501st member of the Local, he does not have standing to complain about possible unlawful election procedures which may have occurred in the Union's 1965 election. See also, *Mamula v. United Steelworkers of America*, 304 F. 2d 108, 113 (3rd Cir. 1962), where the court said:

"... an individual does not have standing to litigate the rights of another. E.g., *McGowan v. Maryland*, 336 U. S. 420 (1961); *Cronin v. Adams*, 192 U. S. 108 (1904)."

And in the absence of a complaint by a union member, the Secretary has no statutory right to invoke the judicial process in order to attack a union election which has rendered moot the issue of the validity of the prior election.

Respondent Union deems it necessary to take issue with the Secretary's inferences, scattered throughout his brief, that it is only the Secretary who is interested in seeing that union elections are fairly and democratically conducted; and that it is only through a "laboratory" election that the advantages, enjoyed by incumbents seeking reelection—in conjunction with the undemocratic procedures employed by these incumbents, may be abated. This inference flies in the face of Petitioner's candid concession at the Pre-Trial Conference held on March 19, 1965, that "there is no claim that there is any particular evil resulting from this election" (R. 9), nor "a corrupt and untrustworthy clique" which has succeeded in establishing itself in office (R. 8).

In view of the Secretary's inferences, it is highly significant that in the instant case the Secretary is championing the cause of an *incumbent* who was denied the opportunity to be a candidate for an office he had held for two terms (R. 27), whereas the union member who was eventually elected to the position formerly held by the complaining union member had never held a union office before he was elected Treasurer in the October 1963 election. Under these circumstances, it is indeed difficult to reconcile Petitioner's inferences that this union is seeking to perpetuate its incumbent officers in office with the candidacy disqualification of an incumbent officer.

Congress has set forth, in express statutory language, the procedure that must be followed before the validity of a union election may be challenged in the courts. Since a suit to declare an election void (with its concomitant demand for a supervised election) is predicated upon the propositions that (1) a union member has made a proper complaint to the Secretary (as to the election under attack after the exhaustion of his internal union remedies), and (2) that the Secretary has made a finding following a careful investigation of the complaint that a violation of Section 401 has probably occurred, it is respectfully submitted that it does not lie within the discretionary power of any court to erase the explicit conditions which Congress has written into the statute.

As the Second Circuit Court of Appeals recognized in the *Local 30* and *Local 410* cases, *supra*:

"... And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, cf. *Calhoon v. Harvey*, *supra*, we conclude that we have no power to afford the Secretary

relief and therefore that these cases are moot." 336 F. 2d at p. 442.¹⁶

And as the Third Circuit Court of Appeals recognized in the *Local 153* case:

"For whatever reasons, Congress, in enacting the enforcement provisions contained in section 402, did no more than to provide an administrative and judicial procedure for determining the legality of a particular election of local union officers. The only suit authorized under section 402 is a suit by the Secretary to set aside that election of which an aggrieved unionist has complained."

Congress intentionally created a narrow remedy under Title IV of the LMRDA so that interference with union elections and management would be kept at a minimum. *Calhoon v. Harvey, supra*, at p. 140.

The Secretary has contended that if these actions are dismissed as moot, frequently scheduled union elections and the procedural requirements of Title IV raise significant barriers to appellate review. However, analysis of the statutory scheme reveals that while a complaining union member must attempt to invoke internal union remedies, he need only wait three (3) months after such invocation before filing his complaint with the Secretary. It is also evident that, while the Secretary must investigate each complaint and make a finding that a violation has probably occurred, the statute requires him to bring his suit, wherein he challenges the election, within sixty (60) days of the filing of the complaint by the union member. As the Second Circuit pointed out in the *Local 410* and *Local 30* cases,

"... it is the delays incident to civil cases in the district courts which create the substantial likelihood that subsequent union elections will moot Title IV cases prior to appellate review."

¹⁶ This language was adopted by the Third Circuit in the *Local 153* case, 372 F. 2d at p. 88.

rather than the design of union officials. Contrary to the Secretary's contention, the "expedition" suggestion of the Second Circuit, which was adopted by the Third Circuit and the Sixth Circuit in the respective cases before them, is not "unworkable." Without the benefit of any mandate from the appellate courts that the district courts are to expedite Title IV cases, the Secretary was empowered by the respective district courts to supervise at least 69% of the 75 elections he had challenged in court actions between the period of September 14, 1959 and June 30, 1965.¹⁷ Only 8 (including the *Local 153* and *Local 125* actions) or less than 9.3% of the 75 actions were dismissed in whole or in part on the ground of mootness.¹⁸ Nevertheless, the Secretary makes much ado of the impeding effect of the application of a mootness doctrine to Title IV cases, and apparently would like to create the impression that if he is not granted judicial relief in these isolated instances, his powers under Title IV will be illusory. In light of the Secretary's concern with percentages (see Point II, pp. 32-33, *infra*, where the Secretary's attack on the union's candidacy requirement rule, because only a small percentage of the union members could qualify as candidates for union office, is discussed), how can he validly argue that if the mootness doctrine is not abandoned in Title IV cases, "effective relief against unlawful elections will in many cases be impossible."? (Petitioner's Brief, p. 38).

As for injunctive relief, *pendente lite*, we are in accord with the Secretary that such relief is not available—even where there is a *prima facie* showing that the Act has been violated. In addition to the reasons set forth by the Secretary in his brief, Congress, after it provided that "an order directing an election shall not be stayed pending appeal," undoubtedly recognized the necessity for balancing the rights of the Secretary against the rights of the union. The

¹⁷ Note, **Election Remedies Under the Labor-Management Reporting and Disclosure Act**, 78 Harv. L. Rev. 1617, 1633 (1965).

¹⁸ See Respondent's Brief in Case No. 58, Appendix B.

quid pro quo for the express legislative denial of a stay of a supervised election when ordered by the court, Section 402 (d), was that the Secretary was implicitly denied *pendente lite* relief.

If a proper interpretation of the express statutory language demands a result which does, in fact, frustrate the objectives of the provisions enacted by Congress in 1959, then the Secretary must appeal to the legislature for such legislative enactments as will, in his judgment, remedy the problems he encounters. Resort to this Court whenever the Secretary is dissatisfied with the results that explicit legislation compels is not the proper avenue for amending the laws of Congress.

II.

PETITIONER HAS FAILED TO ESTABLISH THAT THE MEETING ATTENDANCE REQUIREMENT RULE FOR WOULD-BE CANDIDATES "MAY HAVE AF- FECTED THE OUTCOME" OF THE 1963 ELECTION.

The main purpose and thrust of Title IV of the LMRDA was to prevent a small group of so-called "union leaders" from permanently vesting control of the organization in their hands by either refusing to hold elections, or by holding them under such conditions that no dissenting voice could be heard. At the same time, however, Congress recognized that if responsibility was to be promoted in the rank and file of the union membership, governmental interference with the internal processes of the union must be kept at a minimum. Consequently, although the Secretary was empowered to lend his assistance to union members who desired to achieve a democratically and fairly-administered organization, it must be noted that Congress

"... did not purport to take away from labor unions

the governance of their own internal affairs and hand that governance over either to the courts or to the Secretary of Labor. The Act strictly limits official interference in the internal affairs of unions. See, *Calhoon v. Harvey*, 379 U. S. 134, 57 LRRM 2561 (1964); *Gurton v. Arons*, 339 F. 2d 371, 58 LRRM 2080 (2d Cir. 1964). The Act prescribes only certain basic minima and leaves the area not covered by these minimum prescriptions to the decisions of the unions themselves." *Wirtz v. Hotel, Motel and Club Employees*, — F. 2d —, 65 LRRM, 3032, 3034 (July 28, 1967).

Clearly, a balancing policy was invoked here,¹⁹ and the adoption of the enforcement provisions, set forth in Section 402 and discussed in detail throughout Point I, *supra*, reflect congressional recognition that union autonomy and membership sovereignty must be protected from well-intentioned, but frequently fatal, paternalistic legislative or administrative regulations.

Section 401 (e) of the Act, which is concerned with elections and nominating procedures, is an unequivocal manifestation of congressional reluctance to "dictate to the unions what their constitution and bylaws procedure shall be in conducting their elections,"²⁰ and indicates that the proponents of the Act had no desire to impose "upon the unions [their] notions of what an election straightjacket should be."²¹

"The committee gave careful study to various proposals providing for the conduct of union elections by

¹⁹ In **National Woodwork Manufacturers Assn. v. NLRB**, 386 U. S. 612, 619 (1967), this Court admonished that: labor legislation is peculiarly the product of legislative compromise of strongly held views.

²⁰ Cong. Rec., Senate—April 25, 1959, II Legislative History of the **Labor-Management Reporting and Disclosure Act of 1959**, p. 1244 (1959).

²¹ *Id.* at p. 1245.

the National Labor Relations Board upon the request of a small percentage of the members. The committee rejected this approach for two reasons.

"One fundamental objection is that these proposals turn over to an arm of the State the responsibility for carrying on the internal governmental processes of voluntary associations without any showing that the union officers and members are incompetent or corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."²² (Emphasis added.)

The broad area of discretion afforded unions by Section 401 (e) is consonant with the numerous assurances made by the proponents of the Act: that it was not their intention "to write [or rewrite] the union constitution and bylaws provisions for the union,"²³ or "to turn the Congress of the United States into a constitutional convention and bylaws legislative body for all the unions of America."²⁴

In furtherance of its avowedly laudable desire to keep governmental interference in the internal affairs of a union to a minimum, and in recognition (1) that not all members of the union may be capable or qualified to assume a role of leadership in the internal affairs of the union; (2) that any qualifications which are to be adopted must emanate from the union members themselves through democratic processes; and (3) that such criteria as: ability, knowledge of the trade, a sense of long-term identification with the

²² United States Department of Labor, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, p. 702 (1964).

²³ Cong. Rec., Senate—April 25, 1959, II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, p. 1245 (1959).

²⁴ *Id.* at p. 1244.

local, and interest in union affairs may be germane to office-holding, Congress explicitly empowered unions to adopt basic rules which were designed to protect their legal vital interests and desired objectives. Note that Section 401 (e), in addition to providing that "every member in good standing . . . shall have the right to vote for or otherwise support the candidate or candidates of his choice" without reprisal, expressly reserves to unions the right to impose "reasonable qualifications" upon the right of a member to be a candidate for union office.

One court has determined that the word "reasonable" means "fit and appropriate to the end in view." *State v. Vandersluis*, 43 N. W. 789 (Minn. 1889). And the district court in the *Local 153* case took the position that the "question of reasonableness is a difficult one and must ultimately be decided by the courts in the light of the facts in particular cases." *Wirtz v. Local 153, GBBA*, 244 F. Supp. 745, 748 (W. D. Pa. 1965). It is respectfully submitted that Local 153's 75% attendance requirement rule is *reasonable* under either of the aforementioned tests.²⁵ Even the Secretary has admitted that:

"The question of whether a qualification is reasonable is a matter which is not susceptible to precise definition and in the last analysis will be determined by the courts."²⁶

Totally irrelevant to the issue of "reasonableness" is the number or percentage of the union members who are qualified to be officer candidates because of the meeting attendance requirement rule. In addition:

²⁵ The vacation of the district court's "judgment on the merits" by the Third Circuit (R. 69) leaves the legal issue of the "reasonableness" of Respondent Union's candidacy qualification rule unresolved.

²⁶ Office of Labor-Management Reports: Interpretations Election Provisions, Section 452.7, Candidacy for Office, **Labor Relations Expeditor**, p. 7134 (1964).

"To select a particular percentage of attendance as being reasonable and hence permissible is akin to the task of determining what percentage of market control is necessary to establish the existence of a monopoly."

Wirtz v. Local 153, GBBA, 244 F. Supp. 745, 748.

Furthermore, there is no statutory requirement that a minimum number or percentage of the union membership must meet any "qualification" imposed on would-be candidates.

Equally irrelevant is the history of success or failure of opposition candidates, although it is interesting to note that a non-incumbent member was declared eligible to be a candidate in the 1963 election, at the same time that an incumbent officer was declared ineligible. Whether or not there may be better ways of achieving the legitimate purpose is also irrelevant.

Clearly, whether or not the candidacy qualification is reasonable is a question of law, and the test to be applied in each case is not whether the Secretary, or even the Court, believes that the qualifications imposed by the Union are the best, or the wisest; or the most practical, or even the most reasonable, but only whether the criteria adopted by the union and imposed on would-be candidates can be construed as "reasonable", i.e., whether it is a legitimate device aimed at achieving a salutary objective under the Act.

Turning to the application of this criteria to the present case, it should be specifically noted at this time that the Local 153 case does not involve an attempt by the Secretary to overthrow a corrupt and untrustworthy clique which has established itself in office pursuant to a meeting attendance requirement rule (R. 8). Nor is there a claim that the 75% meeting attendance requirement rule has resulted in mal-administration of the local union by a particular group of incumbents (R. 8). The Secretary explicitly agreed that it

had "no basis for making such an allegation" (R. 8), and even conceded that the *bona fides* of the 75% meeting attendance candidacy qualification, with its avowedly laudable purpose, was in harmony with the aforementioned congressional policy. Of significance, is the following stipulation entered into, *inter alia*, by the parties, prior to trial:

"One of the important purposes and objectives of the delegates to the conventions of the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, in promulgating the 75 per cent attendance requirement for eligibility for local union office was to encourage attendance at local union meetings by the members thereof, in order that such members may become aware of and familiar with the workings of their local unions, the kinds of problems and methods of procedure that confront their local unions in dealing with the problems of its membership, to obtain some knowledge as a predicate to their possible candidacy to union office, and otherwise to conduct themselves as trade union members to the end that they may make their union membership more meaningful." Stipulation I, Sec. 10 (R. 14-15).

After the trial, which was tried without a jury, the district court found as a matter of law that the local union's 75% meeting-attendance candidacy-requirement rule was not *per se* unreasonable (R. 44). However, the court was of the opinion that, when the 75% meeting attendance requirement rule was coupled with the local union's rule regarding excuses, the 75% rule, in effect, severely limited the eligible number of candidates for office and, *a fortiori*, became violative of the Act (R. 44). It is respectfully submitted that under the facts in this case, the district court's legal conclusion that the 75% rule violated the Act was erroneous. Nevertheless, the district court refused to set aside the 1963 election or to order the local union to

conduct its then impending election under the supervision of the Secretary because Petitioner had failed to establish that the 75% rule "may have effected [sic] the outcome" of the 1963 election (R. 46). The trial judge pointed out that the complaining member had "voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-laws but to his own voluntary unwillingness to comply therewith" (R. 47). Accordingly, the Secretary's action was dismissed.²⁷

In the 1963 election, John Miller was the only union member who was declared ineligible to be a candidate for local union office because he had not complied with the meeting attendance requirement rule when he failed to attend 7 of the 24 meetings held since the last election. Despite the fact that Mr. Miller had had many opportunities (even while testifying in court) to explain his absences, he could not account for 6 of the absences. The only absence he offered an explanation for was the November 1961 absence. However, his attendance at any one of the other 6 meetings would have satisfied the meeting attendance requirement rule and would have placed Mr. Miller in a position where he could have competed for the offices he sought. Significantly, as an officer of the Local Union, i.e., Treasurer, it was incumbent upon Mr. Miller to attend "and report monthly to the Local Union meeting the state and condition of all current financial matters." (R. 21). And despite the

²⁷ Attention of the Court is directed to the fact that the Secretary and the Local Union had stipulated that if the district court ruled Local 153's 75% meeting attendance requirement rule invalid, then:

"an order may be entered by [the court] directing nominations and elections for all offices of the defendant Local Union 153 . . . under the supervision of the Secretary of Labor . . ." (R. 22).

Although the district court recognized the laudable purpose of the 75% rule, as had the Secretary in Stipulation I, Section 10 (R. 14-15), the court was of the opinion that only when the 75% rule and the rule limiting excuses were coupled together was there then a violation of the Act (R. 44). The "Stipulation" was therefore inapplicable.

fact that this responsibility was voluntarily assumed by the complainant, Mr. Miller failed to attend 7 of the 24 meetings held during the 2-year qualification period. As the NLRB recognized in the *Local 171, Pulp and Paper Workers* case, 165 NLRB 97, 65 LRRM 1382 (1967),

"Poor attendance at business meetings, sometimes even a lack of a quorum to proceed, is common. It cannot be gainsaid that the public's interest is served best when the memberships of labor organizations that are the exclusive statutory representatives of employees take an active and responsible role in governing their unions and formulating union policy." (Emphasis added.)

It is this widespread apathy toward union meeting attendance, which exists among union members as a whole and is not limited to GBBA members alone, which accounts for the fact that merely a handful of members qualify for union office;²⁸ it is not the 75% meeting attendance requirement qualification that is responsible for the paucity of candidates. To argue that it is the 75% rule, and not the members' own volitional failure to attend meetings, which precludes a large percentage of union members from competing for union offices is myopic. The past and present officers of Local 153 have done everything within their power to encourage union meeting attendance, to wit: (1) the meeting day is fixed; (2) the meeting time is fixed; (3) the meeting place is easily accessible to a majority of the members; and (4) door prizes are offered in the hope of encouraging attendance (R. 15). Despite these attempts to make the meetings more inviting, the evidence reveals that

²⁸ See "Search for Reasons for Rank-and-File Rebellions," 64 *Labor Relations Reports* 133 (Feb. 13, 1967), wherein Malcolm L. Denise, Vice-President of Labor Relations for Ford Motor Co., observed that there is an absence of stability in labor relations, because as he states it:

"For the average member, too many other things compete for his time and attention."

only a handful of members attend union meetings with any sort of regularity.²⁹ It is to this handful that the members, by virtue of their bylaws and constitutional provisions, have entrusted the extremely delicate task of directing the affairs of the local union. It is not the members of any "in group" who have dictated that prospective candidates for office must have attended 75% of the local union meetings, but instead, an informed electorate (delegates elected by the membership-at-large) which recognized that the general membership would fare better if control were placed in the hands of those who were somewhat familiar with the union's problems (R. 14).

The extremely important area of responsibility placed on union leadership in the day-to-day administration of the collective bargaining agreement and the maintenance of proper labor-management relations, so that the benefits of collective bargaining and continuity of employment can be maintained *without interruption* and *without pecuniary loss* to the members, both at their jobs and in the functions of the local unions, cannot be over-emphasized. The 75% meeting attendance requirement rule imposed on would-be candidates for union office comports with the objective set out above, i.e., that the membership of the local union should be assured that persons of competence, skill, ability and knowledge of the union's problems (and what better laboratory for gaining such experience than the union meeting) will be administering the needs of the general membership.

In addition, the trial record clearly established that Mr. Miller had testified falsely as to the number of meetings he was credited with having attended. Compare R. 24-26 with R. 26-34. Also, see the testimony of the Recording Secretary, R. 34-37. Nevertheless, it is the Secretary's contention that had the complainant, a man who had been untruthful about his attendance record on the witness stand and who

²⁹ Report of William B. Kane, Area Director of U. S. Dept. of Labor. (Exhibit A), pp. 1b-3b.

had been derelict in his duties toward his fellow union members, been declared eligible as a candidate, his candidacy might have affected the outcome of the election.³⁰

Since Section 402 (c) provides:

"If, upon a preponderance of the evidence, after a trial, upon the evidence, the court finds . . . that the violation of section 401 may have affected the outcome of the election, the Court shall declare the election . . . to be void . . .",

the burden was upon the Secretary to prove by a preponderance of the evidence that there was a reasonable probability that the disqualification of Mr. Miller as a candidate for Local Union office might have affected the outcome of the Local Union's 1963 election. "The burden of proof and risk of persuasion has been placed upon the party who attacked [the] election." *Wirtz v. Local Union 125, Int'l Hod Carriers', etc.*, 231 F. Supp. 590, 595 (N. D. Ohio 1964). However, the record in this case is barren of any facts which would tend to establish that the alleged violation may have affected the outcome of the election. In addition, the trial court's opportunity to observe the parties and to get the "feel" of the case is entitled to great weight. Consequently, the reviewing tribunal "should not disturb the trial court's findings of facts" unless the Court is thoroughly satisfied that such findings are plainly unsupported by the record.

³⁰ To champion the cause of a man who has exhibited little concern for his fiduciary obligations as an officer flies in the face of the announced congressional policy of the Act which provides:

" . . . it is essential that labor organizations, employers and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations." Section 2 (29 U. S. C. §401 [a]).

CONCLUSION.

For the reasons set out in Argument I, the judgment of the Court of Appeals for the Third Circuit should be affirmed. But in the event this Court should determine that the Secretary's action has not been rendered moot by the union's intervening 1965 election, the judgment of the district court that the union's meeting attendance requirement rule did not affect the outcome of the election should be affirmed, since the district court's legal conclusion that the Union's meeting attendance requirement rule was unreasonable may be regarded as harmless error in this instance.

Respectfully submitted,

ALBERT K. PLONE,
Counsel for Respondent.

October 1, 1967.

APPENDIX.

EXHIBIT A.

William B. Kane, Acting Area Director

March 8, 1966

William J. McGladigan, Compliance Officer

LU 66, GBBA

Washington, Pa.

File: 36-874

On February 25 and 28, and March 4, the following election records of the subject were analyzed and examined.

Attendance Register:

The local's recording secretary maintains an 8½ x 11 permanently bound book which is used as an attendance register. Each member who attends a regular monthly meeting signs the register as evidence of attending the meetings. If a member is unable to attend and is excused his written excuse is attached to the page of the register for that meeting. He is counted present.

The attendance register and written excuses were examined for the period Oct. 1963 to Sept. 1965. During this period the local held 23 regular meetings. There was no meeting held May 1965. Therefore to be eligible for office a member must have attended at least 17 meetings.

As a result of this examination, the following information was obtained:

Percentage of 23 Meetings	No. of Members Attended
75%	9
50%	20
25%	26
less than 25%	152
Number of Meetings	No. of Members Attended
17	9
16	9
15	11
14	13
13	15
12	16
11	19
10	20
9	21
8	22
7	24
6	26
5	30
4	38
3	57
2	82
1	149

Of the total membership of 407, 9 members attended 75% of the 23 regular meetings thereby eligible to be candidates for the 9 offices to be filled. This represents 2.2% of the total membership who were eligible and 97.8% who were not eligible.

The complainant, Edward H. Razvoza, was credited with attending 11 meetings of the total 23 held. Of these 11 meetings 2 were excused absences for working.

William Thompson and Joseph Burke, appointed to fill the 2 offices of trustee for which there were no nominees, attended 11 and 8 meetings, respectively, of the 23 held.

Membership List

The employee list, compiled by Brockway Glass Co. which shows the names and mailing addresses of LU 66 members was used by the election committee to mail notices of nominations and elections to the membership. This list contains 407 names. Grace Longstreath, chairman of the election committee, obtained mailing address labels from the company to mail out the notices. She checked the labels against the list to make sure they corresponded.

The local's regular meetings are held the first Tuesday of the month at 7:00 P.M. in the Labor Temple, Washington, Pa.

Members of the local are employed by the Brockway Glass Company, plant No. 11, Washington, Pa. Both male and female members work 3 eight hour shifts; 8 A.M. to 4 P.M., 4 P.M. to 12 midnight and 12 midnight to 8 A.M.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

NO. 57

W. WILLARD WIRTZ, SECRETARY OF LABOR,
Petitioner

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF
THE UNITED STATES AND CANADA, AFL-CIO

NO. 58

W. WILLARD WIRTZ, SECRETARY OF LABOR,
Petitioner

v.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS FOR
THE THIRD AND SIXTH CIRCUITS

BRIEF FOR THE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations

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<i>Wirtz v. Locals 406, etc., Operating Engineers</i> , 254 F. Supp. 962 (U.S. D.C. E.D. La., 1966)	33
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National Labor Relations Act, 61 Stat. 136 73 Stat. 519 29 U.S.C. 151 <i>et seq.</i> :	
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Miscellaneous:

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Cong. Record 10947-8, Senate, June 12, 1958 ..	19, 20
Cong. Record 7024-5, Senate, April 29, 1959	22

(AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out on pp. 1-3, 55-62 of the Government's brief.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 12~~9~~ national and international labor organizations having a total membership of approximately fourteen million. The Federation seeks to insure that these organizations and their affiliated local unions are responsive to the needs and desires of their members. It also seeks to insure that they are effective instruments for advancing the economic and social interests of the employees they represent. Fulfillment of this dual objective calls for knowledgeable and responsible union leaders, chosen in accordance with standards and procedures freely adopted by each organization, with a minimum of interference from outside sources.

The respondents will naturally be most concerned with the particular facts of the instant cases. But much more is at stake. These cases provide this Court with its first opportunity to consider the scope and nature of the coercive powers accorded the Government by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat 519; 29 U.S.C. 401 *et seq.*, in the critical area of union elections. Inevitably, the Court's decision will do much toward laying down the ground rules governing any attack upon a union's electoral processes. The AFL-CIO is vitally interested in seeing that this Court is aware of what its decision will mean for union democracy and for union effectiveness. We believe that our presentation will assist the Court in interpreting the Act so as best to promote both individual and organizational rights and responsibilities.

SUMMARY OF ARGUMENT

I

The Second, Third and Sixth Circuits, the three Courts of Appeals, which have passed on the question of whether a second regularly scheduled union election moots a suit by the Government seeking to overturn and rerun a prior election, have all held that the second regularly scheduled election does moot a Title IV case. These decisions are correct, for the Congressional conception of the public interest in union democracy included, as a basic component, the recognition that Government intervention in internal union affairs should be kept to a minimum. Title IV of the Act, therefore, accords the Government a narrow, albeit potent, remedial authority. Thus, in a Title IV suit, the Government must *prove* that the union election sought to be set aside was held under conditions which frustrated the expression of the membership's desires in order to provide the predicate for a district court order setting aside that election.

The Government's argument that Title IV grants it broad regulatory powers comparable to those granted to the National Labor Relations Board is untenable. The fact of the matter is that Congress specifically declined to clothe the Government with broad regulatory powers over union elections similar to those it had granted to the National Labor Relations Board. Congress's action in this regard undermines the Government's general contention that Congress feared that incumbents would perpetuate themselves in office by subtly manipulating the conduct of an election in a manner which is not "demonstrably unlawful". If Title IV had been a response to an overriding suspicion of incumbents, Congress would have accepted the proposals requiring Government-run elections rather than rejecting them. Thus the conclusion to be drawn from what was ac-

cepted and what was rejected during the legislative process is that Congress recognized that a Government-run election of union officers was strong medicine; medicine which would be counter-productive in the overall pursuit of union democracy if too liberally applied. Congress, therefore, limited this remedy to the situation where a rerun is necessary in order to replace officers whose terms of office were demonstrably the result of an election which did not reflect the membership's desires.

There is no reason to believe that the holding that a second regularly scheduled union election moots a suit to overturn and rerun a prior election would create substantial administrative problems. Of the cases instituted between 1960 and 1965 there have been only eight in which mootness has entered the picture. This very small number of cases can be expected to be reduced further as the difficult, still unresolved, legal issues pertaining to the meaning of Title IV are settled. Moreover, there is every reason to believe that the courts can expedite their consideration of these suits, if that proves necessary.

II

In the event that this Court decides that No. 58 is not moot, the Government suggests that the Court should also decide whether the District Court was correct in refusing to allow the Government to expand the case beyond the limits set by the complaining union member in his internal protest to his union. We submit that the District Court's decision in this regard was correct. Sections 402(a) and 402(b) of the Act, which control here, should be read together as a single interconnected entity which limits matters the Government has the power to raise, and the district courts have the jurisdiction to consider, in Title IV suits, to the issues which were first raised by union members with their unions.

In contrast, the Government's position is that these sections are separate and distinct and that it has *carte blanche* to introduce any issue it may choose into Title IV court litigation, if it receives a complaint from a ~~union member~~ who has filed an internal complaint, without regard to whether or not that issue was raised by a member's complaint filed in the internal procedures unions provide for hearing appeals as to the conduct of elections. So far as we have been able to ascertain from our research, the essence of the position we urge has been accepted in every case in the lower courts in which a written opinion discussing this point has been issued, including the opinions of both of the Courts of Appeals which have passed on the point.

The purport of the legislative history of Sections 402(a) and 402(b) is clear. The supporters of Title IV in both Houses of Congress, and especially in the Senate where this portion of the Act was written, recognized that the public interest in union democracy, as they viewed it, would be secured most satisfactorily by insuring that union members who were dissatisfied with some aspect of their organization's election procedures, and who were unable to obtain internal relief, would receive Government assistance in presenting their case in court. As a corollary, the legislators believed that in the absence of any expression of membership dissatisfaction to the union itself, the union members should be free, without Government direction, to set their own rules and regulations and to decide which officers they wished to retain and which officers they wished to unseat by protesting their elections. Congress expressed this conception of the public interest by passing legislation that set up a system which balances union autonomy and Government regulation. This end was achieved by a legislative guarantee that unions would be responsive to their membership. This guarantee was redeemed by authorizing the Government to use its coercive powers for the limited

purpose of helping union members achieve the type of organization that they desire, rather than by authorizing the Government to force its views of how the organization should be governed on the membership without regard to their desires.

We do not argue that in determining whether a particular matter may be raised by the Government the union member's internal complaint should be treated as if it is a formal pleading by a trained lawyer. The touchstone should be the complaining member's intent as revealed by a liberal and sympathetic reading of the complaint. The ultimate inquiry is whether the issue the Government seeks to present is an issue that the union had a fair opportunity to consider and resolve in connection with its consideration of the member's internal appeal.

In short, we suggest that in Title IV Congress placed its trust in the union as the initial tribunal for deciding internal appeals. Thus, the function of the exhaustion of remedies requirement is to insure that adequate respect is given to the Congressional allocation of power by requiring members not to bypass the initial deciding body Congress has chosen to hear their complaints.

The Government argues that its position must be accepted because it is enforcing the public interest in union democracy, not the private interests of complaining union members. There is one glaring difficulty with this argument. It is that the inclusion of Sections 402(a) and 402(b) in the Act, and the underlying legislative history, show that Congress believed that the public interest here was to insure that labor organizations would be what union members wanted them to be, and that a concomitant part of this conception of the public interest was that union autonomy and membership sovereignty should not be undermined by

a governmental bureaucracy which enforces its views rather than the members' views.

The Government also claims that the Congressional grant of broad investigatory powers in the Act must have been intended to allow it to seek to overturn an election on any ground found during an investigation, whether or not that ground had been raised by a member with the union through an internal complaint. However, the Government's broad investigatory powers come from the grant contained in Section 601 of the Act and not from Section 402(b). And there is no requirement of exhaustion of remedies as a precondition to investigations by the Government under Section 601 but there is such a precondition to suits under Title IV. This shows that Congress did intend to allow the Government to investigate matters which it could not bring to court.

III

Section 402(c)(2) of the Act requires the Government to prove that the alleged violation of Section 401 "may have affected the outcome" of the challenged election in order to be entitled to judicial relief. In the event that this Court decides that No. 57 is not moot the Government suggests that the Court should also decide whether the District Court's ruling that the Government had failed to sustain the burden imposed by Section 402(c)(2) was correct. The District Court's decision in this regard is correct.

Section 402(c)(2) is a product of the overall Congressional desire to minimize Government interference with internal union affairs by limiting rerun elections to those cases in which there is a reasonable probability that the alleged violation had a practical effect on the challenged election. This being true, at the very minimum, the Government is required to prove, as the prime element of its case, that a willing candidate was actually disqualified by the

unlawful rule in question. There is no sense in overturning an election on the basis of an allegedly unlawful rule if that rule did not operate to disqualify a single person, who had shown a desire to run for office, from the ballot.

In No. 57, the Government did not meet this minimal standard. The District Court found that the Glass Bottle Blower's 75% meeting attendance requirement in combination with Local 153's rule which severely limiting excused absences violated Section 401(e) of the Act. Given this basic finding, it was incumbent upon the Government, in order to satisfy the requirements of Section 402(c)(2), to prove that a prospective candidate was disqualified from the ballot despite the fact that he had attended 75% of the meetings other than those for which he had a valid excuse. However, the Government only presented evidence concerning one potential candidate, and that candidate had not attended 75% of the meetings other than those for which he had a valid excuse.

The Government suggests that union rules governing eligibility to be a candidate should be judged *in vacuo* and that the question of whether they had a practical effect on the conduct of the challenged election should be ignored. This argument is unsound for it reads the limitations of Section 402(c)(2) out of the Act in all such cases.

ARGUMENT

I

A REGULARLY SCHEDULED UNION ELECTION MOOTS A SUIT BY THE GOVERNMENT SEEKING TO OVERTURN AND RERUN A PRIOR ELECTION

In Wirtz v. Locals 410, etc. Operating Engineers, 366

F.2d 438, 442 (2nd Cir., 1966) the Court of Appeals stated:

"The exclusive remedy which Congress has created for challenging a union election, see 29 U.S.C. §483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election. This suit may only be brought after a union member has made a proper complaint to the Secretary and after the Secretary has made a finding of probable cause to believe that a violation of §481 has occurred. Congress intentionally created a narrow remedy under Title IV of LMRDA so that interference with union elections and management would be kept at a minimum. See Calhoon v. Harvey, 379 U.S. 134, 140 (1964)."

"In these two cases, the Secretary has no standing to attack the 1965 elections since no member of Local 30 or of Local 410 has filed a valid complaint challenging them. See Wirtz v Local Union No. 125, etc. 231 F. Supp. 590 (N.D. Ohio 1964). It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, cf. Calhoon v. Harvey, supra, we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot."

The Third Circuit in No. 57 (57 R.65) and the Sixth Circuit in No. 58 (58 R.112), the two other Courts of Appeals which have passed on the mootness question, have followed the reasoning of the Second Circuit and have reached the same result. The briefs of the respondents in Nos. 57 and 58 set out in detail the legal arguments which support the conclusion that a second regularly scheduled election moots a suit by the Government challenging the legality of the prior election. The essence of these arguments is that the Congressional conception of the public

interest in union democracy included, as a basic component, the recognition that Government intervention in internal union affairs should be kept to a minimum, *see pp 13-18 supra*. Title IV of the Act, therefore accords the Government a narrow, albeit potent, remedial authority. Thus, in a Title IV suit, which can only be brought at the behest of and in behalf of complaining union members, the Government must *prove* that the union election sought to be set aside was held under conditions which frustrated the expression of the membership's desires in order to provide the predicate for a district court order setting aside that election and mandating a rerun election to allow the members to choose officers to fill out the displaced officers' terms of office. We submit that these arguments are entirely sound and we incorporate them by reference here. At this point, we will therefore limit ourselves to a few brief observations on the arguments made by the Government.

The Government argues (Gov. Brief 24-25) that Title IV did not create a "narrow remedy", *Locals 410 etc., Operating Engineers, supra*, 366 F.2d at 442, but instead vested it with broad regulatory powers comparable to those granted to the National Labor Relations Board in supervising the conduct of representation elections, *see National Labor Relations Board v. A. J. Tower Co.*, 329 U. S. 329 (1946). In effect, the Government's basic position, as we understand it, is that the holding of an election which does not meet the standards of Title IV raises an irrebuttable presumption that future elections run by incumbent officers will not be run fairly, a presumption which overcomes the normal presumption of legality that would attach to them, *see Section 402(a) of the Act*; and that a "laboratory" election run by the Government, a concept developed by the NLRB, *see General Shoe Corp.*, 77 NLRB 124, 127 (1948), is permissible and necessary in order to remove the "taint" of the first election even though the second election

is not "demonstrably unlawful" and could not be challenged separately.

This argument suffers from a fatal flaw. The fact of the matter is that Congress specifically declined to clothe the Government with broad regulatory powers over union elections similar to those it had granted to the NLRB. Senate Report No. 1684, 85th Cong. 2nd Sess., pp. 12-15; United States Department of Labor, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 701 (G.P.O. 1964)¹ makes this perfectly clear:

"The committee gave careful study to various proposals providing for the conduct of union elections by the National Labor Relations Board upon the request of a small percentage of the members. The committee rejected this approach . . ."

This language undermines the Government's general contention (Gov. Brief 21-25) that Congress feared that incumbents would perpetuate themselves in office by subtly manipulating the conduct of elections in a manner which is not "demonstrably unlawful". If Title IV had been a response to an over-riding suspicion of incumbents, Congress would have accepted the proposals requiring Government-run elections rather than rejecting them. For every union election normally involves incumbents seeking their own reelection or the election of their friends and allies. Moreover, as the Government candidly admits (Gov. Brief 34-36), in contrast to the broad cease and desist powers delegated to the NLRB in Section 10 of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, Congress specifically refused to enact proposals which would have allowed the Department of Labor to obtain injunctive relief which looks to the control and regulation of future elections, *see also Wirtz v. Hotel,*

¹ Hereinafter referred to as Leg. Hist.

Motel and Club Employees Union, Local 6, ... F.2d ..., 65 LRRM 3032, 3036 (2nd Cir., July 28, 1967).

We submit that the conclusion to be drawn from what was accepted and what was rejected during the legislative process is that Congress recognized that a Government-run election of union officers was strong medicine; medicine which would be counterproductive in the overall pursuit of union democracy if too liberally applied. Congress, therefore, limited this remedy to the situation where a rerun was necessary in order to replace officers whose terms of office were demonstrably the result of an election which did not reflect the memberships' desires. Congress did not accord the Government a broad roving commission to run "perfect" elections where such a course of action would require the premature termination of the terms of office of validly elected union officers. To put this another way, Congress recognized that rerun elections have costs as well as benefits, and it determined that on balance the benefits outweigh the costs where the Government can prove that the election which is set aside was not a fair expression of the memberships' desires. Where such proof is offered the premature termination of the term of office of an incumbent is necessary to insure that the union will be run as the members wish it run. However, where the rerun election would terminate the tenure of validly elected officers in the name of a prophylactic policy based on a general suspicion of incumbent officers the considerations are quite different. And Congress determined that in the latter situation the costs outweigh the benefits.

In addition to being contrary to Congressional intent, the irrebuttable presumption the Government offers to justify its position suffers from another defect as well. For if the hypothesis upon which it proceeds is accepted, *arguendo*, it would only justify rerunning the elections of a small group of officers, those who controled the election

machinery in the second regularly scheduled election and whose personal conduct in the first election provides some base for the inference that they may resort to unlawful and unfair conduct to perpetuate themselves in office. Thus, reason dictates that the presumption cannot be applicable where an elected committee of rank and file members runs the second election. It cannot be applicable to incumbent officers who have no voice in running elections. It cannot be applicable to officers elected in the first election who were not incumbents. It cannot be applicable where the infirmity in the first election is that the incumbents applied, in a fair and even handed manner, a rule in an international's constitution later held to be invalid. Finally, it cannot apply if the second election results in the election of new officers. The Government, however, does not even advert to existence of any of these common situations and argues that the irrebuttable presumption it proposes justifies allowing it the power to seek a rerun election in every case in which a second regularly scheduled election occurs while a Title IV suit is pending. However, as we have just shown, it is plain that the underlying argument the Government offers is far too narrow in scope to justify the power it seeks.

The list of situations we have just noted also illuminates another point. It demonstrates that the Government seeks a broad and unstructured discretion, which cannot be limited by reference to the policies of the Act since it is not based on or justified by any provision in Title IV, to intervene in internal union affairs. This discretion would allow the Government the power to monitor the results of elections and to overturn them if the "wrong" man wins and to leave them standing if the "right" candidate, in its eyes, prevails. This is a far cry from the Congressional intent behind Title IV which is to insure that the members are free to have an organization responsive to their desires.

Finally, we wish to suggest that the administrative chaos which the Government suggests (Gov. Brief 27-34) will occur unless its position is accepted is overdrawn. As the Laborers show in detail in their brief in No. 58 of ~~the~~ cases instituted by the Government between June 30, 1960 and June 30, 1965 there have been only eight in which mootness has entered the picture. There are factors which indicate that the very small number of cases which have been affected by the mootness doctrine will probably be reduced further in the future. First, the mootness doctrine appears to have caught the Government unaware. Prior to the decision in *Locals 410, etc., Operating Engineers, supra.*, 366 F.2d at 442, the Government was willing to allow cases to remain dormant for one or two years for reasons of litigation strategy, see *Wirtz v. Locals 545, etc., Operating Engineers*, 366 F.2d 435, 438 (2nd Cir. 1966). It may be presumed that once the mootness doctrine is definitely established the Government will revamp this strategy or secure protective agreements to cover the problem it creates. Second, the Act is still in its infancy and the proper scope of the exhaustion of internal remedies requirement in Sections 402(a) and 402(b) of the Act, the meaning of the provision requiring the Government to prove that the alleged violation "may have affected the outcome of an election" in Section 402 (c)(2), and the proper scope of the permission which allows unions to set reasonable qualifications on the right to run for office in Section 401(e) are all unsettled. Once these basic points have been definitively resolved it is reasonable to expect that litigation under Title IV will be simplified, and that most suits arising under it will involve questions concerning the application of general principles to particular factual situations; questions which will normally be settled in the district courts without the need for appeals. Indeed, we believe that it is fair to say that the Government's insistence on complicating lawsuits by raising issues not raised by complaining union members,

see Section II, *infra.*, indicates that many of its problems are of its own making. Finally, as the Laborers indicate in their discussion of *Ray v. Blair*, 343 U.S. 214 (1952) the Government is insufficiently cognizant of the speed with which the courts can act on election matters. And expedition is possible in this area without imposing a heavy burden on the courts because of the small number of cases necessary to police the Act, a number which reflects the strenuous efforts at voluntary compliance which have been made by the labor movement.

II

IN A TITLE IV LAWSUIT THE GOVERNMENT DOES NOT HAVE THE POWER TO RAISE AND THE DISTRICT COURTS DO NOT HAVE THE JURISDICTION TO CONSIDER MATTERS NOT RAISED BY UNION MEMBERS IN THEIR INTERNAL UNION COMPLAINTS

In the event that this Court decides that No. 58 is not moot, the Government (Gov. Brief 38-49) suggests that the Court should also decide whether the District Court was correct (58 R. 5-14) in refusing to allow the Government to expand the case beyond the limits set by the complaining union member in his internal protest to his union. The validity of this ruling turns on the proper interpretation of Sections 402(a) and 402(b) of the Act, which provide:

"Sec. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months

after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

The Act has now been on the statute books for over six years. During that time, two diametrically opposed positions on the proper interpretation of these Sections have emerged. The first is that Sections 402(a) and 402(b) of the Act are to be read together as a single interconnected entity which limits the matters the Government has the power to raise, and the district courts have the jurisdiction to consider, in Title IV suits, to the issues which were first raised by union members with their unions.

The second position, which has been consistently espoused by the Government (Gov. Brief 44-49), is that Sections 402(a) and 402(b) should be viewed as entirely separate and distinct. The Government's position is that if it

receives a complaint from a union member who has filed an internal complaint as to any matter, it has *carte blanche* to introduce any issue it may choose into Title IV court litigation, without regard to whether or not that issue was raised by the complaint filed in the internal procedures the union provides for hearing appeals as to the conduct of elections.

We submit that the first of these two reading of the Act is the proper one, since it conforms to the accepted canons of legislative interpretation by according full and harmonious effect to both Sections, and since it, and it alone, carries out the Congressional intent as revealed by the legislative history. So far as we have been able to ascertain from our research the essence of our position in this regard has been accepted in every case in the lower courts in which a written opinion discussing this point has been issued, see pp. [redacted] *infra*.

31-35 The Sixth Circuit did not reach this question and thus the normal procedure would be for this Court to reject the Government's suggestion and to simply remand the case to the court below for a decision on the merits. However, the Government has fully briefed the question, and it has been considered extensively by the lower courts. We therefore turn to an exploration of it.

1. Sections 402(a) and 402(b) of the Act are the direct outgrowth of Sections 302(a) and 302(b) of S. 3974 (85th Cong., 2nd Sess.) as it was reported by the Senate Labor Committee and as it passed the Senate on June 17, 1958; and of Sections 302(a) and 302(b) of S. 1555 (86th Cong., 1st Sess.) as it was reported by that Committee and as it passed the Senate on April 25, 1959. These bills in turn stemmed from Sections 4(a) and 4(b) of S. 3751 (85th Cong. 2nd. Sess.), as it was introduced by Senator Kennedy on May 5, 1958. The original Landrum-Griffin Bill, H. R. 8342 (86th Cong., 1st Sess.) as it passed the House,

as well as the earlier version of H. R. 8342 which was reported out of Committee, contained a different procedure for judicial enforcement, one providing for direct court actions by union members rather than suits by the Government.² The Conference Committee adopted in its entirety and without change, the language of Sections 302(a) and 302(b) of S. 1555 and the Conference Committee's version of the legislation in this regard was enacted into law.

After S. 3974 was reported out of Committee in 1958, there were no changes of substance, so far as the issue presented here is concerned, in the language of what was

² H. R. 8342 as it passed the House provided:

"Sec. 402(a). A member of a labor organization—

(1) who is aggrieved by any violation of section 401, and
(2) who (A) has exhausted the reasonable remedies available under the constitution and bylaws of such organizations and of any national or international labor organization with which such organization is affiliated, or (B) has diligently pursued such available remedies without receiving a final decision within six calendar months after their being invoked, may bring a civil action against such labor organization in any district court of the United States for the district having jurisdiction of such labor organization to prevent and restrain such violation and for such other relief as may be appropriate, including the holding of a new election under the supervision of the Secretary and in accordance with the provisions of this title. Where an election has already been held at the time such action is brought, such election shall be presumed valid pending a final decision thereof, as hereinafter provided, and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(b) For the purposes of this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization in the district in which such labor organization maintains its principal office. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff, or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Leg. Hist. 828

to become Sections 402(a) and 402(b) of the Act.³ The enforcement provisions of Title IV did undergo some change during Congress's deliberations, however, the basic structure of the exhaustion of internal remedies requirement was set from the inception of the process that led to the final Act. Thus it is clear that the primary sources for the proper approach to the interrelationship between these Sections are the relevant statements of Senator Kennedy, the original sponsor of the measure, and the majority reports of the Senate Labor Committee on S. 3974 and S. 1555. In his remarks on the floor explaining S. 3751, Senator Kennedy stated:

"At the present time, if a union member feels that his rights have been jeopardized in an election, he is able to appeal to a State court. I have done some research into that matter, and I believe we have found that only one local union election in recent years has been set aside as a result of an attempt by a member to obtain his rights by appealing to a State court. The classic example of the difficulties involved is that of the 13 members of the teamsters union, who, after weeks and months of litigation, have had to accept a settlement which is highly unsatisfactory in regard to the holding of an election; but the lawyer for the rank-and-

³ For the Court's convenience in tracing the evolution of Sections 402(a) and 402(b) of the Act, we have printed the pertinent provisions of S. 3751, S. 3974, S. 1555 and of the Act *seriatum* as an Appendix to this brief. This evolution shows that the following are the only changes made after S. 3974 was reported out of committee. First, S. 3974 required the complaining member to have exhausted internal remedies for four months rather than three, and required the Secretary to bring suit within 30 days rather than 60. Second, the phrase "pertaining to the election and removal of officers" in the first parenthesis in the text of Section 402(a) was not included in Section 302(a) of S. 3974. Third, the provisions relating to a procedure for removing officers, and for court preservation of assets, both of which are found in Section 302(b) of S. 1555 as it passed the Senate and in Section 402(b) of the Act, were not included in Section 302(b) of S. 3974. Fourth, only Section 302(b) of S. 1555 contained a provision relating to service of process.

file members has submitted a bill for \$300,000. So that is, I believe, the classic example of the fact that the right of the members to appeal to a State court is useless.

"In the bill we provide the right to appeal to the Secretary of Labor, whenever a member believes that his rights, as provided in the bill in the case of an election, have been denied to him. Then the Secretary of Labor in effect becomes the union member's lawyer. Such a provision is infinitely stronger than any provision now in effect." Cong. Record 10947-10948, Senate, June 12, 1958, Leg. Hist. 1093.

Moreover, the majority reports of the Senate Labor Committee also contain a very explicit explanation of the purpose of the exhaustion of internal remedies requirement contained in Sections 402(a) and 402(b). Thus, Senate Report No. 1684, pp. 12-15, Leg. Hist. 701 states:

"The foregoing provisions are to be enforced by the Secretary of Labor, upon complaint of any union member, through court action similar to the proceedings to lift improper trusteeships. In filing a complaint the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner. This rule preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections. If the member is denied relief by the union or can obtain no decision from the union one way or the other within 4 months, he may complain to the Secretary."

* * * * *

"The committee gave careful study to various proposals providing for the conduct of union elections by the National Labor Relations Board upon the request of a small percentage of the members. The committee rejected this approach for two reasons.

"One fundamental objection is that these proposals turn over to an arm of the State the responsibility for carrying on the internal governmental processes of voluntary associations without any showing that the union officers and members are incompetent or corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."

The foregoing portion of the Senate Report is a reflection of the overall philosophy which guided the framers of Sections 402(a) and 402(b) and which they stated as follows in Senate Report 187, 86th Cong. 1st Sess., pp. 5-7, Leg. Hist. 118:

"1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.

"2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.

"3. Remedies for the abuses should be direct. Where the law prescribes standards, sanctions for their violation should also be direct. The committee rejects the

* The first portion of this statement appears again in Senate Report No. 187, pp. 19-22, Leg. Hist. 778.

notion of applying destructive sanctions to a union, i.e., to a group of working men and women, for an offense for which the officers are responsible and over which the members have, at best, only indirect control. Still more important the legislation should provide an administrative or judicial remedy appropriate for each specific problem."⁵

Two final points should be noted in order to complete the legislative picture. First, while the approach taken in the original Landrum-Griffin Bill, as it passed the House, was different from that taken in the Senate, that bill also required an exhaustion of internal remedies. Thus as to this matter the dominant factions in both Houses of Congress were on one mind, *see n. 2, p. 18, supra*, and Cong. Record 15707-15708, House, August 12, 1959, Leg. Hist. 823. Second, the inclusion and retention of the exhaustion of internal remedies requirement was a conscious choice made with full recognition of the consequences it entailed. For a minority of Senators, led by Senator Goldwater, argued vigorously that the provision would hinder the effective enforcement of the statute, *see, e.g.*, Cong. Record 16489, Senate, August 20, 1959, Sen. Goldwater, Leg. Hist. 830; Senate Report No. 187, pp. 103-104, Minority Views, Leg. Hist. 783.

2. The purport of this legislative history is clear. The supporters of Title IV in both Houses, and especially in the Senate where this portion of the Act was written,

⁵ With the exception of the above-noted statements, the framers of Sections 402(a) and 402(b) limited themselves to analyses of the bill which track its language and are thus of little help in the resolution of the issue presented here. This is also true of the remarks made by the House supporters of the Senate approach. See e.g., Cong. Record 7953-4, Senate, May 5, 1958, Sen. Kennedy, Leg. Hist. 699; Senate Report No. 187, pp. 46-50, Leg. Hist. 780; Cong. Record 7024-5, Senate, April 29, 1959, Sen. Kennedy, Leg. Hist. 808; Daily Cong. Record A-6573, Appendix July 29, 1959, Rep. Brademas, Leg. Hist. 815; House Conference Report 1147, 86th Cong. 2nd. Sess., pp. 33-35, Leg. Hist. 835.

recognized that the public interest in union democracy, as they viewed it, would be secured most satisfactorily by insuring that union members who were dissatisfied with some aspect of their organization's election procedures, and who were unable to obtain internal relief, would receive government assistance in pressing their case in court. As a corollary, the legislators believed that in the absence of any expression of membership dissatisfaction to the union itself, the union's members should be free, without government direction, to set their own rules and regulations, and to decide which officers they wish to retain and which officers they wish to unseat by protesting their elections. The Congressional conception of the public interest rests on three considerations. First, that there is every reason to trust in the probity, judgment and democratic instincts of union members. Second, that the vitality of union democracy would be dissipated if the autonomy of the organization was not respected, and if its internal procedures were bypassed and permitted to atrophy. Third, that union democracy would be subverted if the Government was given discretion to intermeddle in internal union matters as to which no member had a complaint. In short Congress recognized that a limitation on the coercive powers of the Government was an integral component of its overall conception of the public interest in union democracy.

Congress expressed this conception of the public interest by passing legislation that set up a system which balances union autonomy and government regulation. This end was achieved by a legislative guarantee that unions would be responsive to their membership. This guarantee was redeemed by authorizing the Government to use its coercive powers for the limited purpose of helping union members achieve the type of organization they desire, rather than by authorizing the Government to force its views of how the organization should be governed on the membership without regard to their desires. *See, in general,*

Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609 (1959); Mitchell, *Safeguards for Union Democracy* in Slovensko, Ed., *Symposium on the Labor-Management Reporting and Disclosure Act of 1959*, 135 (1961).

The foregoing, we submit, is the only rational explanation for the inclusion of Section 402(a) in the Act. The requirement that only complaints by union members may be used as a basis for a court suit, and the further limitation that only complaints which have been tendered to the union are a proper predicate for coercive action by the Government, make sense only if it is recognized that the enforcement mechanism of Title IV is the product of the desire: first, to promote the responsibility of the union to its members and equally of the members to their organization; and second, to protect union self-government and membership sovereignty from the overweening weight of an external government bureaucracy. Plainly, the entire remedial scheme is reduced to a logical and practical absurdity if the Government is held to have the power to bring a suit based on matters not raised by union members in their internal complaint. Suppose, for example, that a union has an eligibility rule which the membership wishes to retain and which the Government believes is unsound and should be changed. The union holds an election in 1963 as to which no internal complaint is filed but as to which a direct appeal to the Secretary is made alleging that opposition candidates were threatened with reprisals. No court action is taken because there was no exhaustion of remedies. In 1966, the union holds its next regularly scheduled election and it receives one complaint alleging that the ballot box was stuffed. It investigates and rejects the appeal as unwarranted. The complainant goes to the Government, it investigates and concludes that the complaint is without substance and then files a suit challenging the eligibility requirement. Allowing the Government to

bring suit in the second instance, even though it is plainly barred in the first, would reduce the exhaustion of remedies requirement to a lifeless formality devoid of any actuating principle which explains and justifies its inclusion in the Act. On the other hand, as we have just attempted to show, if the Government is barred from proceeding in both instances, as Congress intended, the compelling logic of the exhaustion of remedies' requirement is preserved.

The cases in which the Government has attempted to litigate issues not raised by the union member may be broken down into two categories. The first category of cases includes those in which allegations are raised by the Government concerning conduct which is said to violate the applicable union constitution or the provisions of the Act, see *Hotel, Motel and Club Employees Union, Local 6, supra.*, 65 LRRM at 3035, or in which the Government challenges provisions of the union's constitution and bylaws as unlawful, see *Locals 545, etc., Operating Engineers v. Wirtz*, . . F.2d . ., 65 LRRM 3041 (2nd Cir., July 28, 1967). The second category of cases are those in which the Government seeks to widen an internal complaint specifically directed to an election for a particular office to include elections for other offices run at the same time, see *Wirtz v. Locals 9, etc., Operating Engineers*, 366 F.2d 911 (10th Cir., 1966) vacated at moot 387 U.S. 96 (1967), as well as No. 58. The general observations on the function of the exhaustion of internal remedies requirement we have set out thus far are applicable to both of these categories of cases.

First, there can be no doubt that the "conduct" cases are precisely governed by the exact words of Senate Report 1684, p. 12, Leg. Hist. 701 that "[the] rule [requiring exhaustion of remedies] preserves a maximum amount of independence and self government by giving every international union the opportunity to correct improper local elections." A suit based on conduct, which violates a union

constitution, or the safeguards established by the Act, and which was not raised by a union member in an internal complaint plainly runs counter to this [redacted] statement of Congressional intent. The cases challenging provisions of a union's constitution have focused on Section 401(e) which permits unions to set reasonable qualifications on the right to run for office. The very purpose of allowing unions to set reasonable qualifications is to enable each organization to set up a system of self-government responsive to its needs, *see Hotel, Motel and Club Employees Union, Local 6, supra*, 65 LRRM at 3033-3035. Such a challenge, which does not lend itself to any simple or precise answer, may, therefore, bring into question the most deep-seated assumptions upon which the organization is built, and it may call for a sensitive balancing of considerations of a political nature. Moreover, as No. 58 indicates, most internal appeals do not raise straightforward questions of statutory law. They often raise questions which require an interpretation of the union's constitution, and are usually grounded in particular facts, and in the practices, usages, and traditions of the group. As to these matters the union is the logical agency to which to look for expertise. Thus, as in the conduct cases, the officers of the union must, before the Government's coercive powers are invoked, be allowed the first opportunity to assess the validity of the rule in light of the objections of those members who consider themselves aggrieved by it. Prior consideration of the rule may obviate the need for litigation, or, if litigation proves necessary, may prove illuminating to the courts. In addition, given the nature of the judgment that must be made when a rule is challenged as unreasonable, surely there is no other area of the Act as to which it is as necessary to ascertain the membership's desires. The members know the organization best and if they have all reached the conclusion that they wish to abide by a certain set of rules, the Congressional policy, which is to insure

Q that the organization is responsive to their desires, is being fulfilled.

The considerations just noted are also relevant in those cases in which the Government attempts to go beyond a complaint, which is limited in terms to a challenge of an election for a specific office, to challenge elections for other offices run at the same time. A complaining member may disapprove of a rule, or conduct, common to the running of all the elections. However, he may also believe that the increased organizational stability which will result if he does not challenge some of the elections is preferable to a rerun of all of them. In other words, he may believe that his aims are accomplished if the union is shown that it has erred, in some respect, in running an election, and that it is not necessary to rerun a number of elections for various offices to accomplish that aim. Or, he may believe that the organization will benefit if the rule in question is overturned in a proceeding in which the costs inherent in a rerun, which may be considerable, are kept to a minimum. Or, he may believe that some of the elected officers are so competent and popular that a rerun of their elections would be a waste of time.

In addition it is reasonable to expect that when a limited complaint is filed the officers whose elections are not put in question normally do not take a part in the internal proceedings of the union. If the Government can expand the members complaint it would mean that the tenure of these officers could be terminated even though they did not have occasion to present their position to the union. In sum whatever the complainant's motives may be, he and his fellow union members know their organization best, and if they have all reached the conclusion that they wish the result of the election for a certain office to stand, the Congressional policy, which is to insure that the organization is responsive to their desires, is being fulfilled. For these reasons, we submit that Congress specifically withheld from

the Government the authority to substitute its judgment for theirs. Indeed when the Government attempts to broaden a complaint focused on an election for a particular office to other elections run at the same time it seizes on a fortuitous circumstance in order to expand its authority. For the union could properly stagger its elections, President one year, Secretary-Treasurer the next, etc. Expansion of a complaint to cover additional offices would plainly make no sense if this course was followed. Moreover Local and International elections may be run at the same time, and it just as plainly makes no sense to say that a challenge to a single Local's election opens the International's to challenge or vice-versa.

At this juncture in our argument we wish to make one point quite clear. We do not contend that in determining whether a particular matter may be raised by the Government the union member's internal complaint should be treated as if it is a formal pleading by a trained lawyer. The touchstone is the complaining member's intent as revealed by a liberal and sympathetic reading of his internal appeal. The ultimate inquiry is whether the issue the Government seeks to present is an issue the union had a fair opportunity to consider and resolve in connection with its consideration of the appeal. Under this standard if the member complains that the ballot box was stuffed, a suit alleging that a provision of the union's constitution governing eligibility of candidates is not a reasonable qualification on the right to run for office should be held to be improper. It plainly does not stem from the member's complaint. Naturally, there will be hard cases in between the extremes—cases which will require some line drawing. But this is normally true in the law, and the dimensions of the problem here seem modest. For unions can and do take steps to see that the complaining member is encouraged to spell out in some detail the areas of his concern in order

to insure that their quasi-judicial procedure for hearing appeals operates in a fair and comprehensive manner. The record thus created will often point the way that a district court should go when this type of factual issue is presented.

In the leading case of *United States v. L. A. Tucker Truck Lines*, 344 U. S. 33, 36-37 (1952), Mr. Justice Jackson stated:

"We have recognized in more than a few decisions and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." (footnotes omitted)

We suggest that in Title IV Congress placed its trust in the union as the initial tribunal for deciding election appeals, since it can offer speedy relief after hearing from all the interested parties, and since the questions which will normally be raised in election contests are those as to which it has expertise, cf. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). Thus, the function of the exhaustion of remedies requirement is analogous to the function of the doctrine stated in *Tucker*. It insures

that adequate respect is given to the Congressional allocation of power by requiring union members not to bypass the initial deciding body Congress has chosen to hear their complaints.

The Laborers demonstrate at length in their brief in No. 58 the painstaking approach they have taken to insure that Congress's trust is respected, an approach which requires a substantial investment of time by the Union's top officers. The conscientious attitude of the Laborers is fully representative of the attitudes of AFL-CIO affiliates. Thus, despite the fact that AFL-CIO unions ran no less than 50,000 elections between 1960 and 1965 the Government instituted only 36 successful cases against them during that time, see

Appendix B to Respondents brief in No. 58. *The significance of the figure is apparent once it is realized that*

The Laborers, [redacted] in five years (1961-1966), [redacted] handled 359 election appeals and that 19 were withdrawn, 95 upheld and 245 denied. Of the 245 denied 3 resulted in successful litigation by the Government. We have asked our two largest affiliates, the United Steelworkers of America and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America to detail their experience in handling election appeals in order to supplement the material presented by the Laborers. The UAW's material covers 1963-1966. It shows that the Union received 76 appeals, that it upheld 14, dismissed 4, and denied 61. In 1 case in which an appeal was denied, and in 1 upholding an appeal the Executive Board was reversed by the Public Review Board instituted by the U.A.W. Of the 61 denials, 1 resulted in successful litigation by the Government. The Steelworkers decided 94 election appeals from 1964 through 1967. In 51 remedial action was ordered. None of the cases in which the appeal was denied resulted in successful litigation by the Government.

3. The essence of the position we urge has been adopted in every case we have found in which the issue presented here has been passed on in a reasoned opinion—including the opinions of both the Courts of Appeals which have addressed themselves to it.

In *Locals 9, etc., Operating Engineers, supra.*, 366 F.2d at 913-914, a case where the complaining member challenged an election for a specific office and the Government tried to broaden its lawsuit to include elections for other offices run at the same time, the Court stated:

“An examination of the legislative history of the Labor Management Reporting and Disclosure Act discloses that it was one of the most controversial efforts before the Congress in a decade. Two years of extensive public hearings had pointed up the need for legislation that would (a) sustain the internal stability of union organizations, (b) guarantee the individual members a voice in the democratic control of the organization and (c) protect the rights of the individual members.

* * * * *

“The debates in the Senate at the time of enactment clearly indicates that all parts of the Act must be read in conjunction with the other parts. 105 Cong. Rec. 6720 (1959) (remarks of Senator Kennedy).

* * * * *

“Thus, the Act itself clearly indicates a limitation on the part of the Secretary and the court to consider only matters in which a member has exhausted his internal remedies. This is in line with the legislative purpose to sustain the stability of the union organization by giving it the first opportunity to correct a grievance of an individual member.”

In *Hotel, Motel and Club Employees Union, Local 6, supra.*, 65 LRRM at 3035-3036, the Second Circuit refused to allow the Government to expand its lawsuit to include allegedly unlawful conduct not complained of by any union member. It stated:

"It appears from the language of the statute itself that the Secretary may proceed to vindicate only those violations with respect to which he has received complaints. The legislative history reveals that Congress intended that the Secretary should have the power to bring an action only after a complaining member has exhausted his union remedies."

* * * * *

"The Secretary argues strongly for a general power to protect the public interest, but nothing in the statute or in its legislative background suggest the existence of any such general power. The Secretary's function is, in Senator Kennedy's words, to act as 'the [complaining] union member's lawyer.'

See also Local 545, etc. Operating Engineers, supra., 65 LRRM 3041 where the same court refused to allow the Government to expand its lawsuit to include an allegedly unlawful constitutional rule not complained of by any union member.

The leading district court decision was rendered in No. 58 where the court stated (58R. 9, 13) :

"Investigation of the deliberations of congress...illuminates the viability of the exhaustion doctrine. At no point did the legislators indicate a willingness to abrogate this traditional requirement in favor of summary action by the federal government; on the contrary, we are confronted at every turn with positive, unequivocal expressions of faith in the ability of unions to regulate their own affairs."

* * * * *

"Plaintiff here invokes the doctrine of 'public interest' [to advance his position]. Can we place this 'public interest' of which the government is here so solicitous above the interest of the individual members of the union? Unions are voluntary associations, organized by workers to promote their common welfare. The sole reason for this existence is to advance the cause of the individual laborer by negotiating from a position of collective strength to secure favorable wages and work-

ing conditions. The individual members intrust this strength to the officers of the union, just as the members of this defendant union did by the election of June 8, 1963. It is highly significant that not one voice of protest has been heard from the membership against the conduct of that election. We do not think that the Secretary under the guise of 'public interest' may be permitted to complain when the membership has not; to hold otherwise would in fact, be inimical to true public interest because it would require legislation by judicial fiat. If the members are satisfied, then the government ought to be satisfied."

See also *Wirtz v. Locals 406 etc., Operating Engineers*, 254 F. Supp. 962 (U.S. D.C. E.D. La., 1966); *Wirtz v. Local 174, Musicians*, 65 LRRM 2972 (U.S. D.C. E.D. La., 1967).

A somewhat different version of this position was taken by the court in *Wirtz v. Local 169, Hod Carriers*, 246 F. Supp 741, 751-752 (U.S. D.C. D. Nev., 1965) where the court held:

"We think the express statutory requirement of exhaustion of internal union remedies must be given effect. We do not, however, believe that it is the intention of the Act to restrict the Secretary's action to the precise complaints asserted by the union member who filed the letter-complaint with the Secretary. The act should receive a practical interpretation governed by common sense and realities. If Congress intended that the union member assert a lawyer-like protest to the Executive Board, covering all the bases by specific averment, and buttressed by evidence of all irregularities in the election, there would be no occasion for an evidentiary investigation by the Secretary.

* * *

"The act should be construed to mean that the Secretary has, on complaint of a union member, the right to investigate all aspects of the contested election and to base a complaint to the Court on every issue which the defendant union had a fair opportunity to consider and resolve in connection with any member's appeal to the General Executive Board of the union. The Secretary should not be limited to the ground

asserted by the one member who complained to the Secretary."

See also *Wirtz v. Local 450, etc., Operating Engineers*, 63 LRRM 2105 (U.S. D.C. S.D., Tex., 1966); *Wirtz v. Hotel and Restaurant Employees Local 705*, 63 LRRM 2315 (U.S. D.C. E.D. Mich. S. D., 1966).

The opinion in *Local 169 Hod Carriers* adds two elements to those recognized in *Locals 9, etc., Operating Engineers, supra*, *Hotel, Motel and Club Employees Union, Local 6, supra* and No. 58. The first is that unions must view each complaint as presenting an overall issue, not just a private dispute between the particular complaining member and the union, and that it must deal with the complaint accordingly. If, for example, a member alleges that a rule was discriminatorily applied in certain instances the union must look into the overall application of that rule in the challenged election, see *Hotel and Restaurant Employees, Local 705, supra*. This interpretation of the Act may have some merit at least in the limited situation where the complaint raises a broad issue as to which the member fails to adduce adequate proof and the member then secures newly discovered evidence, from the government or otherwise, relevant to the basic issue he raised and resubmits that evidence to the union. Next the court stated, 246 F. Supp. at 752, that there are some basic procedural matters, at least those about which the member would have difficulty securing information, which the union must consider in every appeal whether they were raised or not. We flatly disagree with this proposition. The statutory requirement of exhaustion of remedies contains no exceptions for basic procedural matters—to fashion one is pure judicial legislation. Moreover, this latter point cannot and should not affect the Court's decision

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here. For as the court in *Local 169, Hod Carriers, supra*, explicitly recognized the exhaustion of internal remedies requirement is normally applicable, particularly where a matter within the complainant's knowledge is involved. Here there can be no doubt that the complaining member knew that the voters whose eligibility he challenged voted in the general election. Moreover, while we do not believe that the basic rule we propose admits of exceptions, we think it is quite clear that if it does those exceptions should not be worked out in a *dictum* at this point. Rather they should evolve through a process of litigating elucidation as the lower courts apply the basic guidelines set by this Court.

In sum, the status of the law developed by the lower courts is this—every case in point, in which a written opinion has been filed, that we have found, or that the Government has cited, accepts the basic proposition that Section 402(a) and 402(b) are to be read together to limit the [redacted] to issues “the defendant union had a fair opportunity to consider and resolve in connection with any member's [internal] appeal . . .” *Local 169, Hod Carriers supra*, 246 F.Supp. at 752 (emphasis supplied). It being understood that for some courts issues mean not simply an individual grievance (Was the complainant discriminated against in the application of a union rule?) but the underlying question raised (Was there discrimination in this election in the application of the rule?) On the other hand, there is no case, in which a reasoned opinion has been rendered, which stands for the proposition, advanced by Government, that a member's complaint merely triggers the Government's authority to initiate court action and that the Government then has *carte blanche* to introduce any issue it may choose into the litigation without regard to the scope of the member's internal complaint.

4. We shall now attempt to show that none of the Government's counter arguments disproves the validity of our

position. The Government first argues (Gov. Brief, pp. 17-19, 43-44) that its position must be accepted because it is enforcing the public interest in union democracy, not the private interests of complaining candidates for office. There is one glaring difficulty with this argument. It is that the inclusion of Sections 402(a) and 402(b) in the Act, and the legislative history we have outlined, show that Congress believed that the public interest here was to insure that labor organizations would be what union members wanted them to be, and that a concomitant part of this conception of the public interest was that union autonomy and membership sovereignty should not be undermined by a governmental bureaucracy which enforces its views rather than the membership's views. In short, the aim of Title IV is to provide machinery through which complaining union members may secure assistance in vindicating their position in the courts. There is thus no distinction between the public interest and the interests of complaining members. The Government's argument is in no wise strengthened by its showing, with which we agree, that Title IV protects the rights of all union members not just losing or disqualified candidates. For the issue here is whether the Government can utilize its coercive powers by raising an issue which *no* union member has shown an interest in raising, not whether the Government can raise an issue as to which a member, other than a candidate, has complained.

This conception of the public interest in union democracy, and its method of vindication, is perfectly consistent with this Court's recognition in *Calhoon v Harvey*, 379 U.S. 134, 140 (1964) that in Title IV "Congress decided to utilize the special knowledge and discretion of the Secretary in order to best serve the public interest". Under our view the Secretary is still charged with the responsibility of achieving voluntary compliance; of drawing together membership complaints about an election, if there are more than one, and welding them into a single coherent lawsuit; of

giving form and direction to the statute by issuing rules and regulations which serve to guide union officers and union members; of skillfully developing and arguing before the courts the matters raised by union members; and of investigating union members' unproved or half-proved allegations to see if they have substance and should be pressed to vindicate the public interest in union democracy or should be dismissed short of court, thereby saving the union from the expense of defending frivolous and vexatious litigation. Moreover, he does all this at the public's expense rather than at the expense of union members who might not be able to afford to do it for themselves. Plainly, the diligent and sensitive effectuation of all these tasks is a sufficient responsibility for any Government official.

The Government next argues (Gov. Brief 45) that the language of Section 402(b) ("The Secretary shall investigate such complaint and if he finds probable cause to believe that a violation of this Title has occurred . . . he shall . . . bring a civil action . . .") lends some support to its view that a lawsuit brought under that Section may be based on issues other than those raised by union members. If Section 402(b) began by stating, "The Secretary shall investigate *in its entirety* any election about which he has received a complaint . . .," we could see some logic in the Government's argument that the use of the words "if he finds . . . a violation of this Title has occurred . . . he shall . . . bring a civil action" advances its cause. But that is not the way the legislation reads. Instead, Section 402(b) opens by referring to the member's complaint and by limiting the ensuing investigation and resulting suit to the subject matter of that complaint. Once this point is taken into account, the actual import of Section 402(b), read in its entirety, supports our position rather than the Government's, for the reference to the member's complaint is an explicit recognition that Sections 402(a) and 402(b) are related to each other as a single interconnected entity. Since

the Government's powers are explicitly tied to the member's complaint at the start of Section 402(b), it is most logical to conclude that Congress realized that it was unnecessary, in order to manifest its will, to use the redundant "such violation" rather than "a violation."

We have pointed out, pp. 18-19 *supra.*, that the operative language of what was to become Sections 402(a) and 402(b) had hardened into final form as Sections 302(a) and 320(b) of S.3974 (85th Cong., 2nd. Sess.) Nevertheless the Government's argument from the legislative history relies on the language of Section (b) of S.1002 (86th Cong., 1st Sess.) a bill that was not even being considered at the relevant time, to show that the use of the phrase, "a violation" was a conscious rejection of the narrower phrase, "such violation." Moreover, it should be pointed out that S. 1002 was not in any sense an attempt to amend or perfect S. 3974. It was a complex bill which contained a procedure for regulating elections completely different from the one embodied in S. 3974, and in the Act, and it proceeded from far different premises than those shared by the drafters of the final legislation. Clearly, therefore, it is an unlikely source from which to expect enlightenment on the intentions of those who actually conceived the Act. Equally unenlightening is the quotation from Senate Report No. 187 for it merely paraphrases rather than explains the language of the Act. In short the Government's linguistic argument is untenable.

The Government also claims (Gov. Brief 45-47) that the Congressional grant of broad investigatory powers in the Act must have been intended to allow it to sue to overturn an election on any ground found during an investigation whether or not that ground had been raised by a member with the union through an internal complaint. This claim springs from an erroneous assumption. There is nothing to indicate that the Government was given broad powers of in-

vestigation by Section 402(b) of the Act. The inference is in the other direction, for investigations under Title IV are tied to the complaint ("The Secretary shall investigate such complaint"). Moreover under Section 402(b) the Government is given sixty days to bring suit not sixty days to investigate the complaint. In light of the many tasks the Government must perform as the complainant's lawyer, see pp. 36-37 *supra.*, this period does not indicate a Congressional desire to have the government investigate the entire election before deciding whether to file suit. It is a call to swift action not to a broad investigation.

In actuality the Government's broad investigatory powers come from the grant contained in Section 601 of the Act, 29 U.S.C. 521, and the cases it cites (Gov. Brief 45-46) arose under that Section. Once this is recognized the entire scheme of the Act falls into place. For it is then clear that Congress placed a requirement of exhaustion of remedies in Title IV of the Act as a pre-condition to court action to set aside a union election, but that it did not place any such requirement as a pre-condition to investigations by the Government under Section 601, see *Wirtz v. Local 191, Teamsters*, 321 F.2d 445 (2nd Cir., 1964). To our mind, this shows that Congress did indeed intend to allow the Government to investigate matters which it could not bring to court. The Government in its zeal to expand its powers fails to realize that instances where it believes there is an uncorrected wrong, but can not secure court relief, are a natural product of the overall balance between union autonomy and government power that Congress struck in this area. For example, if a union member comes to the Government and tells [redacted] that there has been a union election with gross illegalities, and the Government's investigation leads it to the conclusion first, that the allegations are true and second, that there has been no internal protest to the union of any sort, it cannot go to court.

There are sound reasons for this distribution of power when the Government's educational and persuasive functions, as opposed to its coercive functions, are taken into account. For, if the Government's investigation shows that election violations exist which were not discovered by the membership, or to which the members have made no objection, it can inform them and the general public of its findings. The possibility of disclosure, as Congress recognized, has a strong prophylactic effect on union action. Moreover, if investigation indicates fraud or other wrongdoing, disclosure could lead to membership action to remove the officers responsible, see Section 401(h) or to criminal proceedings, see Section 607. In this regard, it should not be forgotten that the overall title of this act is "The Labor-Management Reporting and Disclosure Act of 1959" and that the title is the reflection of the Congressional belief that disclosure in and of itself is a powerful weapon. As the District of Columbia Circuit noted:

"The public disclosure functions of Section 601 have a certain similarity of purpose with the disclosure concepts of the Securities and Exchange Act; to a degree each has as its purpose ventilation of facts in which the public at large, as well as a particular segment—here union members—have a genuine interest. A labor union is not a private enterprise. Congress seems to have thought that reporting and disclosure would serve a prophylactic function, deterring some of the corrupt practices and acts of untrustworthiness on the part of union officers which Congress had found prevalent, and would enable union members to govern their organizations more intelligently." *International Brotherhood of Teamsters v Wirtz*, 346 F.2d 827, 831 (D.C. Cir., 1965).

Indeed, the fact that the Government has fought to vindicate its broad powers under Section 601 demonstrates that when it is to its advantage it has recognized the force of our argument, and that the Government has relied on the argument in urging successfully that it has the power to

investigate an election even though no complaint has been filed.

The fact that it has been held that the Government can investigate an election about which it has received no complaint indicates that its reliance (Gov. Brief n. 27 pp. 47-48), as an analogy, on cases, such as *National Labor Relations Board v. Fant Milling Co.*, 360 U.S. 301 (1959), which delineate the power of the N.L.R.B.'s General Counsel to expand a charge, is misplaced. For if the analogy were sound it would suggest that the General Counsel, as well as the Secretary of Labor, could investigate a matter without a charge. But he can not. And it would suggest that any person, and not just a union member who has exhausted internal remedies, could file a complaint with the Secretary of Labor, see *National Labor Relations Board v. Indiana & Michigan Electric Co.* 318 U.S. 9, 17-18 (1943). But this is clearly not the case. This indicates that the powers of the General Counsel and the Secretary are in no way comparable. The power accorded to either one of them can not be determined by reference to the powers of the other. This is so because the structure of the legislation they administer, and the policies that underlie them, are entirely different.

It is, we believe, the Government's failure to appreciate the balance that Congress struck here that is also responsible for its suggestion (Gov. Brief 48-49) that exhaustion of remedies by a union member was not required in this case because the Government indicated, through a notice to the union after its investigation, that it took the position that the entire general election was unlawful. The purpose of Section 402(a) is to encourage union self-government; and government by the Secretary's suggestion in the form of a threat to take coercive action, rather than through a

process of interaction between the union and its members, may be called any of several things but not self-government. Moreover, it is clear that this argument proves far too much. Since there is no requirement that the Government limit its investigations to elections about which there has been a complaint, this argument, if accepted, would sanction a suit under 402(b) to set aside a union election, about which no member had complained, as long as the Government told the union it believed that the election was unlawful in some respect prior to filing its suit. In short, this argument effectively reads the limitation of Section 402(a) out of this Act.

III

IN NO. 57 THE DISTRICT COURT'S DETERMINATION THAT THE GOVERNMENT FAILED TO PROVE THAT THE ALLEGED VIOLATION AFFECTED THE OUTCOME OF THE ELECTION IS CORRECT

Section 402(e)(2) of the Act requires the Government to prove that the alleged "violation of Section 401 may have affected the outcome of the [challenged] election" in order to be entitled to judicial relief. In No. 57 the District Court ruled that the Government had failed to sustain this burden (57 R. 47). The Third Circuit did not review this portion of the District Court's decision; nevertheless, the Government suggests (Gov. Brief 49-52) that this Court should decide whether the District Court was correct as to this aspect of the case in the event it holds that No. 57 is not moot. Given the posture of the case, the normal procedure would be for this Court to reject the Government's suggestion and to simply remand the case to the court below for a decision on the merits. However, since

the Government has briefed the question we now turn to a brief consideration of it.

The final wording of what was to become Section 402(c)(2) was arrived at in the drafting of Section 302(e) of S. 1555. (86th Cong. 1st Sess.) by the Senate Labor Committee. The Committee added the modifying words "may have" to the phrase "If . . . the court finds . . . that the [alleged] violation affected the outcome . . ." Senate Report No. 187, pp. 46-50, Leg. Hist. 780 explains the meaning of the language chosen in the following words:

"Section 302(e): Provides for a trial of the issues in proceedings or action brought under this section by the district court. If the court, upon a preponderance of this evidence, finds that (1) an election was not held within the time prescribed by section 301, or (2) a violation of section 301 did or reasonably could have been expected to affect the result of an election, the court is to declare the election void and direct the holding of a new election under supervision of the Secretary of Labor."

See also Cong. Rec. 19765, Senate, Sept. 14, 1959, Sen. Goldwater, Leg. Hist. 838-839.

In *Locals 410, etc. Operating Engineers, supra*, 366 F.2d at 443, the Second Circuit, the only Court of Appeals which has passed on this point, set out the following interpretation of the purport of the language chosen:

"The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8-1 margin, the proviso should prevent upsetting the election. Compare *Wirtz v. Local 11, International Hod Carriers*, 211 F. Supp. 408 (W.D. Pa., 1962). But in the cases at bar, the alleged violations caused the exclusion of willing

candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here." (emphasis added)

Thus as the discussion relating to election tampering demonstrates the Second Circuit recognized that Section 402(c)(2) was a product of the overall Congressional desire to minimize Government interference with internal union affairs by limiting rerun elections to those cases in which there is a reasonable probability that the alleged violation had a practical effect on the challenged election. In others words, Section 402(c) (2) is part of the general plan of Act which requires the Government to prove, by a preponderance of the evidence, that the challenged election was held under conditions which frustrated the expression of the memberships' desires and not an exception to it. Taking this point into account, as well as the change in language made by the Senate Labor Committee just noted, the Second Circuit then held that if the Government shows that a willing candidate was unlawfully disqualified from the ballot the Government has met the burden of proof imposed on it by Section 402(c)(2). In other words, it freed the Government from the task of making a showing, which it deemed speculative, as to what the results of the election would have been if all willing candidates, who should have been allowed to run, had been allowed to appear on the ballot. We do not believe that the Court of Appeals relaxation of the requirements of Section 402(c)(2) was proper. But the validity of its approach in that regard is not raised by No. 57. However, the Court of Appeals' opinion is

plainly correct inssofar as it retained the essence of the Congressional desire to limit rerun elections by requiring the Government to prove, as the prime element of its case, that a *willing candidate* was actually disqualified by the unlawful rule in question. This portion of its holdings is sufficient to decide the issue presented in No. 57. The burden of proof thus placed on the Government is plainly consistent with the intent of Congress since it can not be deemed to sanction speculation as to the shape of events which never took place. Moreover the rule suggested is entirely rational since there is plainly no sense in overturning an election on the basis of an allegedly unlawful rule if that rule did not operate to disqualify a single person, who had evidenced a desire to run for office, from the ballot.

In No. 57, the Government did not meet the minimal standard set for it by the Second Circuit's decision in the *Locals 410, etc. Operating Engineers* case. The District Court found that the Glass Bottle Blower's 75% meeting attendance requirement, did not violate Section 401(e) standing alone but was unlawful when combined with Local 153's rule which severely limited excused absences. The illegality found thus inhered in the two rules taken in combination (57R.44). Given this basic finding it was incumbent upon the Government in order to satisfy the requirement of Section 402(c)(2) to prove that some prospective candidate was disqualified from the ballot despite the fact that he had attended 75% of the meetings other than those for which he had a valid excuse. However, the Government only presented evidence concerning one potential candidate, and that candidate had not attended 75% of the meetings other than those for which he had a valid excuse (57R.47).

Following the pattern set in its arguments on the first two issues presented, the Government's argument on this point seeks a result which would read the limitations of

Section 402(c)(2) out of the Act in cases in which a union rule governing eligibility to be a candidate for office is in issue. In effect the Government claims that such rules should be judged *in vacuo* and that the question of whether they had a practical effect on the conduct of the challenged election should be ignored. For the Government argues (Gov. Brief 50-52) that if a rule would have the effect of disqualifying a large percentage of the membership it "may have affected" the outcome of the election even though not a single one of the "disqualified" members desired to run for office whether he was eligible or not. The first difficulty with this argument is that such a union rule is not, necessarily, as the Government apparently assumes, an unreasonable rule under Section 401(e) of the Act. As the Second Circuit held in *Hotel, Motel and Club Employees Union, Local 6, supra*, 65 LRRM at 3034, 3035:

"In deciding the issue of reasonableness we must keep in mind the fact that the Act did not purport to take away from labor unions the governance of their own internal affairs and hand that governance over either to the courts or to the Secretary of Labor. The Act strictly limits official interference in the internal affairs of unions. See, *Calhoon v Harvey*, 379 U.S. 134 (1964); *Gurton v Arons*, 339 F.2d 371, (2d Cir. 1964). The Act prescribes only certain basic minima and leaves the area not covered by these minimum prescriptions to the decisions of the unions themselves."

* * * * *

"Turning to the application of these policies to the present case, we hold that it is not self-evident that basic minimum principles of union democracy require that every union entrust the administration of its affairs to untrained and inexperienced rank and file members."

* * * * *

"The Secretary of Labor make much of the fact that only about 1700 [out of 26,000] members of the union are eligible for election to the 31 elective offices. How-

ever, when this number is combined with the fact that all members in good standing for one year have the opportunity to become eligible for office by getting themselves elected to seats in the four hundred-odd member Assembly, the numbers, per se, do not seem to us to establish unreasonableness."

The second difficulty is that such a rule simply can not be presumed to be one which works a "mass disqualification of candidates" to use the Government's phrase (Gov. Brief 52). Under Article II, Section 1 of the Constitution of the United States any natural born citizen, over 35 years of age, and a resident within the country for 14 years can run for President. It is surely an absurdity to say that all those in the excluded class are candidates for the Presidency and that Article II Section 1 works a mass disqualification of them. If a person is to be considered a candidate for office there must be a showing that he seeks that office, or that he was selected by others as a contestant for that office. If this is not required the term becomes meaningless.

In sum we urge that in order to satisfy the requirement of Section 402(c)(2) the Government must, at the very least, prove that a union member who desired to run for office, i.e. a willing candidate, was prevented from doing so by an unlawful union rule. Since the Government did not make such a showing in No. 57 the decision of the District Court should be affirmed.

CONCLUSION

For the above stated reasons, as well as those presented by the respondents in Nos. 57 and 58, the decisions of the Third and Sixth Circuits, which hold that each of these cases is moot, should be affirmed. Should this Court hold that the cases are not moot, and should it decide to reach the subsidiary questions presented by the Government, the

decisions of the District Courts in both No. 57 and No. 58
should be affirmed.

Respectfully submitted,

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APPENDIX A

S. 3751, 85th Cong., 2nd Sess., May 5, 1958:

"Sec. 4(a) A member of a labor organization—

(i) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(ii) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary of Labor within four calendar months after an election alleging the violation of any provision of sections 201, 202 or 203 (including violation of the constitution and bylaws of the labor organization). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) If the Secretary upon investigation of the complaint finds probable cause to believe that violation of this Act has occurred and has not been remedied, he shall, within thirty days of filing of such complaint, and without disclosing the identity of the complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election under the supervision of the Secretary and in accordance with the provisions of this Act."

S. 3974, 85th Cong., 2nd Sess., June 17, 1958:

"Sec. 302. (a) A member of a labor organization—

(i) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(ii) who has invoked such available remedies without obtaining a final decision within four calendar months after their invocation.

may file a complaint with the Secretary of Labor within one calendar month thereafter alleging the violation of any provision of section 301 (including violation of the constitution and bylaws of the labor organization). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and if he finds probable cause to believe that a violation of this Act has occurred and has not been remedied, he shall, within thirty days of filing of such complaint, or as soon thereafter as possible but in no event after sixty days, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election under the supervision of the Secretary and in accordance with the provisions of this Act and such rules and regulations as the Secretary may prescribe."

S. 1555, 86th Cong., 1st Sess., April 15, 1959:

"Sec. 302. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation.

may file a complaint with the Secretary of Labor within one calendar month thereafter alleging the violation of any provision of section 301 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal

of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The service of summons, subpena or other legal process of a court of the United States upon an officer or agent of a labor organization in his capacity as such shall constitute service upon the labor organization. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

The LMRDA as enacted:

"Sec. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall

be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

SUPREME COURT OF THE UNITED STATES

No. 57.—OCTOBER TERM, 1967.

W. Willard Wirtz, Secretary
of Labor, Petitioner, } On Writ of Certiorari to
v. } the United States Court
Local 153, Glass Bottle } of Appeals for the Third
Blowers Association, etc. } Circuit.

[January 15, 1968.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner, the Secretary of Labor, filed this action in the District Court for the Western District of Pennsylvania seeking a judgment declaring void the election of officers conducted by respondent Local Union on October 18, 1963, and directing the conduct of a new election under the Secretary's supervision.

Section 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 482 (b), authorizes the Secretary of Labor, upon complaint by a union member who has exhausted his internal union remedies, to file the suit when an investigation of the complaint gives the Secretary probable cause to believe that the union election was not conducted in compliance with the standards prescribed in § 401 of the Act, 29 U. S. C. § 481. If the court finds that a violation of § 401 occurred which "may have affected the outcome of an election," it "shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary."¹ The alleged illegality in the

¹ LMRDA § 402, 29 U. S. C. § 482:

"(a) A member of a labor organization—

"(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

"(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

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election was a violation of the provision of § 401 (e), 29 U. S. C. § 481 (e), that in a union election subject to the Act every union member "in good standing shall

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

"(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe.

"(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

"(2) that the violation of section 401 may have affected the outcome of an election,

"the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization.

"(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal."

The complaining union member invoked his internal union remedies on October 24, 1963, and not having received a final decision within three calendar months, filed a timely complaint with the Secretary.

be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed)"

A Local bylaw provided that union members had to have attended 75% of the Local's regular meetings in the two years preceding the election to be eligible to stand for office.² The union member whose complaint invoked the Secretary's investigation had not been allowed to stand for President at the 1963 election because he had attended only 17 of the 24 regular monthly meetings, one short of the requisite 75%; under the bylaws, working on the night shift was the only excusable absence and none of his absences was for this reason.

The District Court held that the meeting-attendance requirement was an unreasonable restriction upon the eligibility of union members to be candidates for office and therefore violated § 401 (e),³ but dismissed the suit on the ground that it was not established that the violation "may have affected the outcome" of the election.

² Article IX, § 1, of the International Constitution provided that: "All candidates for office, before nomination, must have attended 75 per cent of the meetings for at least two years prior to the election."

Article 4, § 12, of the Local's bylaws provided:

"No member may be a candidate unless said member is in good standing and has attended seventy-five per cent (75%) of the regular local meetings since the last local election."

And § 13 further provided:

"In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting. . . ."

³ As a consequence of the meeting-attendance requirement, only 11 of the 500-member Local were eligible to run for office in 1963. The Vice President and Financial Secretary ran for re-election unopposed and there were no candidates for Recording Secretary and for three Trustee positions. These positions were filled by appointment of members who could not have qualified as candidates under the meeting-attendance requirement.

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244 F. Supp. 745. The Secretary appealed to the Court of Appeals for the Third Circuit. The appeal was pending when the Local conducted its next regular biennial election in October 1965. The Court of Appeals held that the Secretary's challenge to the 1963 election was mooted by the 1965 election, and therefore vacated the District Court judgment with the direction to dismiss the case as moot. In consequence, the court did not reach the merits of the question whether the unlawful meeting-attendance qualification may have affected the outcome of the 1963 election. 372 F. 2d 86.⁴ Because the question whether the intervening election mooted the Secretary's action is important in the administration of the LMRDA, we granted certiorari, 387 U. S. 904, and set the case for oral argument with No. 58—*Wirtz v. Local 125, Laborers' Int'l Union, post*, at —. We reverse.

The holding of the Court of Appeals did not rest on any explicit statutory provision that on the happening of another unsupervised election the Secretary's cause of action should be deemed to have "ceased to exist." *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 313.⁵ Indeed a literal reading of § 402 (b) would more reason-

⁴ Pending decision on the appeal, the Court of Appeals, on the Secretary's application, remanded the case to the District Court to permit the Secretary to make a post-judgment motion to have the 1965 election declared invalid. The District Court denied the motion. That denial was also appealed to the Court of Appeals, which affirmed on the ground that ". . . absent a complaint by a union member challenging the 1965 election, the Secretary had no authority to sue to establish the invalidity of that election." 372 F. 2d, at 88. Our decision makes unnecessary any consideration of the correctness of that holding.

⁵ The Court of Appeals adopted the holding of the Court of Appeals for the Second Circuit in *Wirtz v. Local 410 et al., IUOE*, 366 F. 2d 438. The Court of Appeals for the Sixth Circuit in No. 58, *Wirtz v. Local 125, Laborers' Int'l Union, post*, also followed the Second Circuit.

ably compel the contrary conclusion. For no exceptions are admitted by the unambiguous wording that when "the violation of § 401 may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary" (Emphasis supplied.)

Nonetheless, this does not end the inquiry. We have cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve. See, e. g., *National Woodwork Mfrs. Assn. v. NLRB*, 386 U. S. 612, 619. The LMRDA is no exception.⁶

A reading of the legislative history of the LMRDA, and of Title IV in particular, reveals nothing to indicate any consideration of the possibility that another election might intervene before a final judicial decision of the Secretary's challenge to a particular election. The only reasonable inference is that the possibility did not occur to the Congress.⁷ We turn therefore to the question

⁶ Archibald Cox, who actively participated in shaping much of the LMRDA, has remarked:

"The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words." Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960).

⁷ There are references to the desirability of expeditious determinations of the Secretary's suits, but it is clear from the contexts in which they appear that the concern was to settle as quickly as practicable the cloud on the incumbents' titles to office and not to

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whether, in light of the objectives Congress sought to achieve, the statute may properly be construed to terminate the Secretary's cause of action upon the fortuitous event of another unsupervised election before final judicial decision of the suit.

The LMRDA has seven subdivisions dealing with various facets both of internal union affairs and of labor-management relations. The enactment of the statute was preceded by extensive congressional inquiries upon which Congress based the findings, purposes and policy expressed in § 2 of the Act, 29 U. S. C. § 401.⁸ Of special significance in this case are the findings that "in the public interest" remedial legislation was necessary to

avoid possible intervention of another election. See S. Rep. No. 187, 86th Cong., 1st Sess., 21, I Leg. Hist. 417; 104 Cong. Rec. 7954, Leg. Hist. 699 (Dept. Labor 1964) (hereafter cited D. L. Leg. Hist.) (Senator Kennedy); 104 Cong. Rec. 11003, D. L. Leg. Hist. 710 (Senator Smith); cf. Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 631-634 (1959). The provision of § 402 (d), 29 U. S. C. § 482 (d), that "an order directing an election shall not be stayed pending appeal" is consistent with the concern that challenges to incumbents' titles to office be resolved as quickly as possible.

⁸ The background and legislative history of the 1959 Act are discussed in Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851 (1960); Cox, *Internal Affairs of Labor Unions*, *supra*, n. 6; Levitan & Loewenberg, *The Politics and Provisions of the Landrum-Griffin Act, in Regulating Union Government* 28 (Estey, Taft & Wagner eds. 1964); Rezler, *Union Elections: The Background of Title IV of LMRDA*, in *Symposium on LMRDA* 475 (Slovenko ed. 1961). And see Cox, *Preserving Union Democracy*, *supra*, 7, at 628-634.

Although Senator Kennedy, a principal sponsor of the legislation, counseled against mixing up the interests of providing for internal union democracy and of enacting measures concerned with relations between labor and management, see 105 Cong. Rec. 883-885, II Leg. Hist. 968-969; cf. S. Rep. No. 187, *supra*, n. 7, at 5-7, I Leg. Hist. 401-403, neither the debates nor the Act itself reveal unwavering adherence to this principle. See, e. g., Cox, *Internal Affairs of Labor Unions*, *supra*, n. 6, at 831-833.

further the objective "that labor organizations . . . and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations . . .," 29 U. S. C. § 401 (a), this because Congress found, "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees and other failures to observe high standards of responsibility and ethical conduct . . ." requiring "supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations . . . and their officers and representatives." 29 U. S. C. § 401 (b).

Title IV's special function in furthering the overall goals of the LMRDA is to insure "free and democratic" elections.⁹ The legislative history shows that Congress weighed how best to legislate against revealed abuses in

⁹ "It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has a significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. The best assurance which can be given is a legal guarantee of free and periodic elections. The responsiveness of union officers to the will of the members depends upon the frequency of elections, and an honest count of the ballots. Guarantees of fairness will preserve the confidence of the public and the members in the integrity of union elections." S. Rep. No. 187, *supra*, n. 7, at 20; and H. R. Rep. No. 741, 86th Cong., 1st Sess., 15-16, I Leg. Hist. No. 416, 773-774. See S. Rep. No. 187, *supra*, at 2-5; H. R. Rep. No. 741, *supra*, at 1-7, I Leg. Hist. 398-401, 759-765.

union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.¹⁰ The extensive and vigorous debate over Title IV manifested a conflict over the extent to which governmental intervention in this most crucial aspect of internal union affairs was necessary or desirable. In the end there emerged "a general congressional policy to allow unions great latitude in resolving their own, internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon v. Harvey*, 379 U. S. 134, 140.

But the freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into § 401. International union elections must be held not less often than once every five years and local union elections not less often than once every three years. Elections must be

¹⁰ See S. Rep. No. 187, *supra*, n. 7, at 7, I Leg. Hist. 403:

"In acting on this bill [S. 1555] the committee followed three principles: 1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. . . . [I]n establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents. 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. . . . 3. Remedies for abuses should be direct. . . . [T]he legislation should provide an administrative or judicial remedy appropriate for each specific problem."

See also *ibid.*: "The bill reported by the committee, while it carries out all the major recommendations of the [McClellan] committee, does so within a general philosophy of legislative restraint."

The election title of the Senate bill referred to in the Committee Report was enacted virtually as drafted by the Senate.

by secret ballot among the members in good standing except that international unions may elect their officers at a convention of delegates chosen by secret ballot. 29 U. S. C. §§ 481 (a), (b). Specific provisions insure equality of treatment in the mailing of campaign literature; require adequate safeguards to insure a fair election, including the right of any candidate to have observers at the polls and at the counting of ballots; guarantee a "reasonable opportunity" for the nomination of candidates, the right to vote without fear of reprisal, and, pertinent to the case before us, the right of every member in good standing to be a candidate, subject to "reasonable qualifications uniformly imposed." 29 U. S. C. §§ 481 (c), (e).

Even when an election violates these standards, the stated commitment was to postpone governmental intervention until the union was afforded the opportunity to redress the violation. This is the effect of the requirement that a complaining union member must first exhaust his internal union remedies before invoking the aid of the Secretary. 29 U. S. C. § 482 (a). And if the union denies the member relief and he makes a timely complaint to the Secretary, the Secretary may not initiate an action until his own investigation confirms that a violation of § 401 probably infected the challenged election. Moreover, the Secretary may attempt to settle the matter without any lawsuit; the objective is not a lawsuit but to "aid in bringing about a settlement through discussion before resort to the courts." *Calhoon v. Harvey, supra.* And if the Secretary must finally initiate an action, the election is presumed valid until the court has adjudged it invalid. 29 U. S. C. § 482 (a). Congress has explicitly told us that these provisions were designed to preserve a "maximum amount of independence and self-government by giving every inter-

national union the opportunity to correct improper local elections." S. Rep. No. 187, 86th Cong., 1st Sess., 21, I Leg. Hist. 417.

But it is incorrect to read these provisions circumscribing the time and basis for the Secretary's intervention as somehow conditioning his right to relief once that intervention has been properly invoked. Such a construction would ignore the fact that Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV.¹¹ Congress deliberately gave exclusive enforcement authority to the Secretary, having "decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." *Calhoon v. Harvey, supra.* In so doing, Congress rejected other proposals, among them plans that would have authorized suits by complaining members in their own right.¹² And Congress unequivocally declared that once the Secretary establishes in court that a violation

¹¹ See, e. g., S. Rep. No. 187, *supra*, n. 7, at 34, I Leg. Hist. 430:

"The committee bill places heavy reliance upon reporting and disclosure to union members, the Government and the public to effect correction of abuses where they have occurred. However, the bill also endows the Secretary of Labor with broad power to insure effectuation of its objectives. . . ."

"He has power to— . . . (e) investigate violations of the election provisions and bring court actions to overturn improperly held elections and supervise conduct of new elections

"The committee believes that the *broad powers granted to the Secretary* by this bill combined with full reporting and disclosure to union members and the public *provides a most effective combination of devices by which abuses can be remedied.*" (Emphasis added.)

¹² S. 748, 86th Cong., 1st Sess., I Leg. Hist. 84, 118-134; H. R. 8342, 86th Cong., 1st Sess., I Leg. Hist. 687, 727-729. See H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 35, I Leg. Hist. 939.

of § 401 may have affected the outcome of the challenged election, "the court *shall* declare the election . . . to be void and direct the conduct of a new election under supervision of the Secretary . . ." 29 U. S. C. § 482 (c). (Emphasis supplied.)

We cannot agree that this statutory scheme is satisfied by the happenstance intervention of an unsupervised election. The notion that the unlawfulness infecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election. That conclusion was reached in light of the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions. See S. Rep. No. 1417, 85th Cong., 2d Sess. These abuses were among the "number of instances of breach of trust, . . . [and] disregard of the rights of individual employees . . ." upon which Congress rested its decision that the legislation was required in the public interest.¹⁸ Congress chose the alternative of a supervised election as the remedy for a § 401 violation in the belief that the protective presence of a neutral Secretary of Labor would best prevent the unfairness in the first election from infecting, directly or indirectly, the remedial election. The choice also reflects a conclusion that union members made aware of unlawful practices could not adequately protect their own interests through an unsupervised election. It is clear, therefore, that the intervention of an election

¹⁸ See, *supra*, pp. 6-7.

in which the outcome might be as much a product of unlawful circumstances as the challenged election cannot bring the Secretary's action to a halt. Aborting the exclusive statutory remedy would immunize a proved violation from further attack and leave unvindicated the interests protected by § 401. Title IV was not intended to be so readily frustrated.

Respondent argues that granting the Secretary relief after a supervening election would terminate the new officers' tenure prematurely on mere suspicion. But Congress, when it settled on the remedy of a *supervised* election, considered the risk of incumbents' influence to be substantial, not a mere suspicion. The only assurance that the new officers do in fact hold office by reason of a truly fair and a democratic vote is to do what the Act requires, rerun the election under the Secretary's supervision.

The Court of Appeals concluded that it would serve "no practical purpose" to void an old election once the terms of office conferred have been terminated by a new election. We have said enough to demonstrate the fallacy of this reasoning: First, it fails to consider the incumbents' possible influence on the new election. Second, it seems to view the Act as designed merely to protect the right of a union member to run for a particular office in a particular election. But the Act is not so limited, for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.

We therefore hold that when the Secretary of Labor proves the existence of a § 401 violation that may have affected the outcome of a challenged election, the fact that the union has already conducted another unsupervised election does not deprive the Secretary of his right to a court order declaring the challenged election void.

and directing the conduct of a new election under his supervision.¹⁴

The judgment of the Court of Appeals is reversed and the case remanded to that court with direction to decide the merits of the Secretary's appeal.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

¹⁴ There is much discussion in the briefs of possible alternatives to our conclusion, such as expediting proceedings under § 402 to bring about their final decision before the next regular election, or injunctive relief against the conduct of that election pending final decision in the Secretary's suit. That discussion, however, assumes a construction of the statute contrary to that which we have reached and therefore requires no comment.